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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

No. 663

JULIA OBARTUCH,

Petitioner,

vs.

SECURITY MUTUAL LIFE INSURANCE COMPANY,
A CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

ROY MASSENA,
DONALD N. SCHAFFER,
Counsel for Petitioner.

THE GUNTHORP-WARREN PRINTING COMPANY, 210 WEST MONROE, CHICAGO

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To the Honorable Charles Evans Hughes, Chief Justice, and the Associate Justices of the Supreme Court of the United States:

The petition of Julia Obartuch respectfully shows unto this Honorable Court:

A.

Summary Statement of the Matter Involved.

This was an action brought in the Superior Court of Cook County, Illinois, by petitioner, as beneficiary, upon two policies for $10,000 each, insuring the life of her husband, Frank Obartuch, issued by the respondent. Upon removal to the District Court of the United States, a jury was waived. The District Court found the issues for the respondent, and its judgment was affirmed by the Circuit Court of Appeals for the Seventh Circuit, one judge dissenting.

Although questions of law only were decided by the Court of Appeals, the consideration of such questions and the matters presented by this petition requires some reference to the pleadings, proceedings and evidence in the District Court.

The Pleadings.

The complaint was in the usual form with the two policies set forth *haec verba*, including the incontestable clause[1] (R. 3-5). Prayer for summary judgment of $20,000 with interest from November 21, 1934 was supported by petitioner's affidavit under the Illinois Practice Act (R. 6, 7).

Respondent's answer admitted the execution and issuance of the policies, dated June 27, 1931 and July 28, 1931, the death of Frank Obartuch on October 28, 1934, the payment of all premiums and that said policies had been in full force and effect for more than two years (R. 10, 14); but denied liability for the sum demanded thereon or that petitioner was entitled to any payment except $4,855.60, the amount of premiums paid, for the reasons,

> (1) That some person unknown to respondent was fraudulently substituted for Frank Obartuch at the medical examination, said unknown person having been falsely represented to respondent's examiner, Eli Rubens, to be Frank Obartuch by respondent's agent, A. J. Friedman (R. 11); and
>
> (2) That the application for said policies was void as either
>
> (a) Frank Obartuch did not sign or authorize anyone to sign said application, or
>
> (b) Frank Obartuch did not knowingly sign said application (R. 11, 12).

---

1. This clause provided: "Incontestability.—This policy and the application therefor, a copy of which is endorsed hereon and attached hereto and made a part hereof, constitute the entire contract between the parties and shall be incontestable after it has been in force during the lifetime of the insured for a period of two years from its date of issue, except for the nonpayment of premiums and except as stated in the clause relating to Military or Naval Service * * *" (R. 73, 74).

The answer further alleged that the respondent, on March 14, 1935 [5½ months after Frank Obartuch's death], notified petitioner of its election to rescind said policies for fraud, and tendered the amount of the premiums paid thereon to Michael and Henry Obartuch, sons of Frank Obartuch, who had paid the premiums, which tender was refused (R. 13, 14).

It was further alleged that the policies were void because of a misrepresentation of the age of Frank Obartuch under a certain rule of respondent as to endowment policies (R. 12).

The District Court denied petitioner's motion for summary judgment for want of a substantial defense (R. 21, 22).

Limitation of the Issues for Trial.

Petitioner contends that respondent voluntarily submitted the case for trial by the District Court upon the sole issue of the alleged fraudulent substitution of some person other than Frank Obartuch at the medical examination, thereby waiving and abandoning all other defenses set up in its answer, including the question whether Frank Obartuch knowingly signed the application.

The record shows that when the case was called for trial, counsel discussed with the Court the waiver of a jury pursuant to a prior agreement. During the course of this discussion, **counsel for the respondent stated on three occasions that the only issue which the respondent was presenting for trial was whether there was a substitution of another person at the medical examination** (R. 64, 65, 66).

In his opening statement, counsel for respondent stated that it was immaterial whether Frank Obartuch signed the application and that **it would still be immaterial "if he**

knew what he was signing and somebody else took the medical examination''[2] (R. 66).

The Court of Appeals concluded that the issue as to signing was not waived, although the Court expressed some doubt as to its decision in that regard (R. 739). That Court pointed to a statement of respondent's counsel, made when petitioner was offering proof of Frank Obartuch's signatures on the application, that he contended that either these signatures were forgeries or he did not know what he was signing (R. 739, 97). But the Court of Appeals disregarded the fact that *thereafter* when petitioner renewed her motion for judgment, it was expressly predicated upon the statements of respondent's counsel that the only issue was the question of substitution (R. 102), and that during the discussion of said motion it was stated that when the motion for summary judgment on the pleadings was made there were two issues, respondent contending that the insured had not signed the application, whereas at the trial the only defense was that of substitution (R. 103-105). Numerous objections to evidence were made by petitioner's counsel based on the ground of irrelevancy to the only issue presented for trial by respondent, that of substitution at the medical examination, and at no time did counsel for the respondent state that such was not the fact.[3]

The record further shows that respondent's counsel persisted in the theory that the only defense necessary to present was that of the alleged substitution at the medical examination, for during an argument on the admissibility

2. This part of the statement of respondent's counsel was omitted in the quotation of such statement in Footnote 2 of the opinion of the Court of Appeals (R. 738).

3. These objections and the colloquy thereon are collected in an appendix to the Petition for Rehearing in the Court of Appeals (R. 779-789) and also appear in the Record at pages 102-105, 161, 170, 172, 173, 228, 243, 277, 287, 371, 380, 383, 438, 659, 661 and 662.

of certain evidence he stated that if Frank Obartuch "knew that there was a substitution, the policy would be, notwithstanding, void" (R. 394). Respondent maintained the same position in the Court of Appeals, where it stated in its brief (quoted in the petition for rehearing in the record here):

> "We still maintain that the issue in this case, confused and befogged as it has been by plaintiff's brief, is whether a substitution in the medical examination for the named insured is a defense under the incontestable clause." (R. 775.)

The Evidence.[4]

1. *As to the Alleged Substitution.*

Frank Obartuch, the insured named in the policies in suit, was born in Poland and came to this country in 1897. He was naturalized in 1909 at Chicago, where he resided with his family, consisting of his wife Julia, the petitioner, his sons, Michael and Henry William, and his daughter, Matilda.

The medical examination for these policies was made at the Obartuch home on June 11, 1931 by Dr. Eli Rubens, respondent's examiner. Dr. Rubens examined the son Henry at the same time, filling out applications, in three parts, for Frank Obartuch and Henry William Obartuch[5] (R. 106, 107, 113).

The petitioner and four other persons, the two sons, the daughter and one Thomas J. McCormick, an attorney, testified that they were present during these examinations, that Frank Obartuch was examined by Dr. Rubens, who

4. We set forth only such part of the evidence and proceedings as are material upon the questions here presented.

5. These applications are to be found in the record as follows: For Frank Obartuch, Part 1 (R. 79), Part 2, Questions of Medical Examiner and Answers thereto (R. 118), Part 3, Medical Examiner's Report (R. 116); for Henry Obartuch, Part 1 (R. 428), Part 2 (R. 324), Part 3 (not admitted R. 431).

asked him certain questions and wrote on a paper, after which Frank Obartuch signed said paper and the doctor signed it (R. 449, 475, 537, 589, 609).

Dr. Rubens, called by the respondent as its witness, testified that he met the respondent's agent Friedman in front of the Obartuch home and that Friedman took him into the home and introduced him to two men, one represented as Frank Obartuch, and the other his son[6] (R. 132). After testifying that the three parts of the application for Frank Obartuch were in his handwriting (R. 107) and to various steps in the examination (R. 110-112), Rubens stated that a photograph of Frank Obartuch then shown to him, was not that of the person he had examined (R. 113).

Thereupon respondent offered and the Court admitted in evidence, as *Defendant's Exhibits* 4 and 5, Part 3 and Part 2 respectively of the application of Frank Obartuch (R. 115). Part 2 is the "Questions of the Medical Examiner and Answers Thereto", dated June 11, 1931 (R. 118, 119). It was completely filled out by Dr. Rubens except for the signature of Frank Obartuch, who declared above his signature that he was the person described therein, that he had reviewed and understood all the questions and answers, which, as written were full, complete and true. To the left of the signature of Frank Obartuch appears the following declaration over the signature of Eli Rubens:[7]

> **"I declare that I saw the applicant attach his signature to this application, and that the applicant reviewed with me the above agreement and answers to questions (all of which were written in in ink) before he signed the same.**
>
> **(s) Eli Rubens, M.D.,**
> **Medical Examiner.**
>
> **Dated at Chicago, Ill., this 11th day of June, 1931"** (R. 119).

---

6. Friedman also testified as respondent's witness and denied he introduced Rubens to a person he said was Frank Obartuch (R. 333).

7. Because of the importance of Parts 2 and 3 of this application, we respectfully refer the Court to the photostatic copies thereof in the Record at pp. 116-119.

Respondent's counsel then asked Dr. Rubens if the person represented as Frank Obartuch signed this Part 2 of the application in his presence. Petitioner's counsel objected on the ground that Rubens had so certified in the application itself, but the Court permitted the witness to answer (R. 121, 122). Thereupon Rubens testified that the man named Frank Obartuch did not sign any documents in his presence (R. 122).

No further questions concerning the execution of the application were asked by respondent's counsel. On cross-examination Rubens testified that after writing the answers to the questions, he left the application with the man represented as Frank Obartuch, and in the case of Henry William Obartuch he left it with Henry. Rubens further stated that he next saw the applications the day following these examinations at the insurance office (R. 130).

No further testimony concerning the circumstances of the execution of the declaration or certificate of Rubens on Part 2 of the application was elicited by the respondent. However, the inferences drawn from his testimony by the Court of Appeals requires a reference to the record showing as to the date upon which these documents were executed. All of the parts of the application were dated by Rubens "June 11, 1931," the date on which the medical examination took place according to the testimony of witnesses for both parties. Moreover, the respondent recalled Rubens in rebuttal for the purpose of corroborating the time of these examinations and Rubens then testified that June 11, 1931 was on a Thursday and that he specifically recalled going from the Obartuch home after these examinations to the Mt. Sinai Hospital on this particular Thursday, *i. e.*, June 11, 1931 (R. 675).

[It should be noted at this point that not only did Rubens deny the fact certified over his signature and incorporated into the policies, but when called upon by the petitioner,

not by the respondent,[8] to explain his self-contradiction, he testified to two matters, the falsity of which appears from common knowledge of the conduct of insurance examinations. By this testimony Rubens claims that he turned over to the person examined the medical questions and the answers written by him, containing his signature to a certificate that he saw the applicant sign the same, without having procured the signature of the applicant thereto, and that in some unexplained manner that application appeared at the insurance office the following day. More incredible, if that is possible, is the fact that the document, which Rubens said he left with the applicant, contained on its reverse side (R. 108, 115), Part 3 of the application, the medical examiner's confidential report to his company for the purpose of determining insurability. This part of the application is not attached to the policy and is never shown to the applicant by the company or any of its agents (R. 108, 109). Part 3 of this application (R. 116, 117) was completely filled out by Rubens, except for his findings on the urinanalysis which were recorded thereon the next day at the insurance office (R. 124). Thus, by this testimony Rubens claims that he delivered to the applicant his confidential report showing that he unreservedly recommended the applicant for insurance (R. 117) prior to submitting the same to his own company.]

2. *As to the Signatures to the Application.*

The policies in suit were issued upon one application and medical examination. The second policy was issued upon an amendment dated in August, 1931 (R. 87). Another amendment as to the age of Frank Obartuch was executed on July 3, 1931 (R. 89). The signatures of Frank Obartuch on these two amendments and on Part 1 of the application, dated June 11, 1931, were witnessed by the respondent's

8. Respondent's counsel contended that Rubens' testimony contradicting his certificate was admissible, stating "Now, the certificate there is not under oath. He is under oath now" (R. 122).

agent A. J. Friedman. The signature to Part 2 was made in the presence of the examiner Rubens, according to the certificate signed by Rubens (R. 119).

Proof that these documents bore the genuine signature of Frank Obartuch was made (R. 98, 99) and nothing to the contrary appears in the record. Moreover the record shows that when counsel for the petitioner objected to the findings of fact submitted to the District Court by respondent, on the ground that the respondent had waived any right to impugn or contradict the signature of Frank Obartuch, that Court not only agreed that there had been such a waiver, but also stated:

"There is no question about his signature" (R. 705).

3. *As to Other Matters.*

The evidence in the record as to other matters than those considered above covers a wide range. The respondent introduced evidence as to the age, physical characteristics and the ability of Frank Obartuch to speak, write and read the English language, his financial condition and state of health both prior and subsequent to the issuance of these policies, the payment of premiums thereon by his sons, the disruption of the family relationship in October, 1933, more than two years after the policies were issued, and his unsuccessful attempt by suit to cancel a deed to certain real estate to one of his sons. Attorneys, who represented Frank Obartuch in connection with his family troubles, were permitted to testify to statements, attributed to Frank Obartuch, that he had certain insurance policies, making no reference to the policies in suit, or to denials that he had any policies with the respondent company.

We mention this evidence briefly for the reason that it will be stressed by the respondent. However, none of these matters is material, indeed the evidence concerning the same should have been excluded, if the questions of law

presented by this petition, the only questions considered by the Court of Appeals (R. 737), are resolved in favor of the petitioner's contentions. All of the proffered evidence concerning matters outside the scope of the sole issue presented for trial by respondent, that of the alleged substitution at the medical examination, was received over petitioner's objections (R. 779-789).

Findings and Conclusions of the District Court.

At the conclusion of the trial, the District Court found the issues for respondent, stating that in his opinion "this was a brazen attempt to perpetrate a colossal and gigantic fraud in order to obtain money unlawfully and illegally" (R. 702).

That Court refused a Conclusion of Law submitted by the petitioner to the effect that the defense of fraud, including the substitution of another person for the insured at the medical examination, was barred by the incontestable clause of the policies under the law of Illinois applicable thereto (R. 703, 704).

The Court entered findings of fact and conclusions of law submitted by respondent. The substance of the findings was:

1. That the policies in suit were issued upon the life of some person other than Frank Obartuch, which other person submitted to a medical examination by Dr. Rubens;

2. That *if Frank Obartuch signed* the insurance application and answers to questions of the medical examiner and amendments thereto, he did so, not knowing the contents of said documents or with the intention of obtaining insurance from the respondent (R. 711);

3. That the policies were obtained by the petitioner and her sons, without the knowledge or consent of Frank Obartuch, by the substitution with their knowledge of a person other than Frank Obartuch at the medical examination (R. 712).

The substance of the Court's conclusions of law was:

1. That it is contrary to public policy for any person to obtain life insurance by substituting an individual other than the name insured for medical examination, and a policy secured by such substitution is void (R. 712, 713).

2. That the incontestable clause in the policies in suit does not preclude the defense that the person examined by the defendant's medical examiner was not Frank Obartuch, but someone else who impersonated said Frank Obartuch (R. 713).

3. That said policies did not constitute a valid contract with Frank Obartuch and, if valid at all, were contracts upon the life of the person examined by the defendant's medical examiner (R. 713).

4. That there was never any valid contract of life insurance upon the life of Frank Obartuch because he never knowingly signed any application therefor or authorized any other person to sign an application for him (R. 714).

OPINIONS AND JUDGMENT OF THE COURT OF APPEALS.

The Court of Appeals refused to apply the law of Illinois, which precludes the defense of fraud in procuring policies after the contestable period has expired, on the ground that the policies in suit were not merely voidable but were void *ab initio* by reason of the finding that Frank Obartuch did not knowingly sign the application (R. 742). To reach this conclusion the Court determined that the respondent had not waived the issue raised by its answer as to the signing of the application (R. 739), although the Court was uncertain and expressed some doubt as to its conclusion in that respect. The Court noted that the statements of respondent's counsel were confusing as to the issue which it intended to rely upon, but held that, taken as a whole, it appeared that the respondent did not intend to dispute that the genuine signature of Frank Obartuch appeared on the application but that he signed without knowl-

edge of its contents (R. 738). The Court also said that the finding on the issue as to signing was pertinent to the issue of substitution (R. 739). These conclusions are further weakened by the fact that the Court, in setting out pertinent statements of respondent's counsel (R. 738), **omitted the statement of respondent's counsel that even if Frank Obartuch knew what he was signing, it was immaterial to respondent's defense of substitution** (R. 66).

On the second question, as to the admissibility of Rubens' testimony contradicting his certificate in the policy, that Frank Obartuch's signature to Part 2 of the application was attached in his presence, the Court of Appeals held, in its first opinion, that the Parol Evidence Rule was inapplicable because the defense was fraud which rendered the contract void *ab initio* (R. 743). After the reargument directed by the Court upon the petition for rehearing, the Court filed an additional opinion[9] on the question of the admissibility of Ruben's testimony. In this latter opinion, the Court recognized that the exception to the Parol Evidence operated only when the execution of the instrument sought to be varied by parol was induced by fraud. The Court justified its original holding by concluding that Rubens' signature to his certificate was the result of fraud practiced upon him. This conclusion was predicated upon an inference[10] that Rubens did not sign this certificate until the day following the examination and that it was then represented to him by some interested in procuring the insurance that it had been signed by the person he examined the day before (R. 814). The Court also purported to distinguish the case of *New York Life Insurance Co.* v. *Stewart*, 69 F. (2d) 957, in which the

9. The first opinion was filed April 12, 1940 and the opinion on the petition for rehearing was filed August 14, 1940.

10. Reference to the summary of the evidence on pp. 5, 7 hereof shows that these "inferences" are contrary to the respondent's own evidence and the testimony of Rubens as to the date of the examination.

Court of Appeals for the Fifth Circuit expressly held that testimony of a medical examiner was inadmissible because it contradicted statements in an insurance application, by stating that the *Stewart* case was decided upon grounds of estoppel (R. 814, 815).

The Court denied the petition for rehearing and affirmed the judgment of the District Court. Judge Treanor filed a dissenting opinion stating that the petition for rehearing should be granted and the judgment of the District Court reversed (R. 817).

On October 1, 1940 the Court granted petitioner's motion for leave to file a second petition for rehearing but denied said second petition (R. 839).

B.

Jurisdiction.

Statutory Provision Believed to Sustain Jurisdiction.

The statutory provision under which jurisdiction of this Court is invoked is Title 28, U. S. C., § 347 (a) (Judicial Code, § 240 (a), as amended by the Act of February 13, 1925).

Dates of Judgment and Denial of Petitions for Rehearing.

The date of the judgment to be reviewed is April 12, 1940 (R. 746).

The petition for rehearing was denied, after reargument thereon (R. 811, 812), on August 14, 1940 (R. 817), one judge dissenting (R. 817).

Petitioner's motion for leave to file a second petition for rehearing was granted, and said second petition for re-

hearing was denied on October 1, 1940 (R. 839). Since the second petition was entertained, the statutory period of time within which application to this Court for a writ of certiorari may be made, runs from the date the second petition for rehearing was denied, namely, October 1, 1940. (*Gypsy Oil Co.* v. *Escoe,* 275 U. S. 498.)

C.

Questions Presented.

1. Whether the testimony of the respondent's medical examiner contradicting the fact certified by him in the application, attached to and made a part of the policies in suit, that the person examined by him signed said application in his presence, was inadmissible (a) under the Parol Evidence Rule and (b) under the law of Illinois precluding a party from impeaching documents which such party introduces in evidence.

2. Whether the law of Illinois that the incontestable clause in said policies barred the defense of fraud was applicable to the defense of fraudulent substitution, at the medical examination, of another person for the named insured, where the named insured signed the application and amendments thereto under which said policies were issued.

D.

Reasons Relied Upon for the Allowance of the Writ.

The decision of the Court of Appeals for the Seventh Circuit, in the instant case, squarely conflicts with the decision of the Court of Appeals for the Fifth Circuit in *New York Life Insurance Co.* v. *Stewart,* 69 F. (2d) 957, with respect to the admissibility of parol evidence contradicting statements in an application attached to and made a part of a life insurance policy.

In this case the Court of Appeals for the Seventh Circuit sustained the ruling of the trial court permitting the respondent's medical examiner to testify that he did not see the person examined sign Part 2 of the application, thereby directly contradicting his own declaration and the certificate over his signature in said application.

In the *Stewart* case the Court of Appeals for the Fifth Circuit held (p. 958) that the trial court erred in admitting testimony of a medical examiner which contradicted the statement in the application to the effect that the answers to questions asked by the examiner were written as made by the applicant.

To the same effect, see *Metropolitan Life Insurance Co.* v. *Alterovitz,* 214 Ind. 186, 14 N. E. (2d) 570, 117 A. L. R. 770, 789.

The decision of the Court of Appeals sustaining the admissibility of the testimony of the medical examiner failed to follow or to give effect to the applicable decisions of the courts of Illinois, holding that a party may not impeach its own documentary evidence. It is clear that this testimony denying the facts stated in Part 2 of the application was a direct impeachment of that document, which was offered and received in evidence as Defendant's (Respondent's) Exhibit 5 (R. 115, 118). The Court of Appeals, while expressly stating that Part 2 was respondent's exhibit (R. 743), gave no consideration in its opinion to the decisions of the Supreme Court of Illinois that a party may not dispute or contradict its own exhibits.

Nolan v. *Barnes,* 268 Ill. 515, 521.

Schneider v. *Sulzer,* 212 Ill. 87, 95.

Cuneo Press Co. v. *Industrial Commission,* 341 Ill. 569, 572.

Moreover, Ruben's testimony, denying that he saw the applicant attach his signature to Part 2 of the applica-

tion also impeached the statements made by Rubens in his Confidential Report (Part 3), which likewise was offered by respondent and received in evidence as Defendant's Exhibit 4 (R. 116) over the objection of the petitioner (R. 114). Rubens stated in his Report that he was satisfied that the person he examined was the person represented in the application, and also that he had no knowledge of any facts or conditions, other than those stated therein, which, if known, might affect the judgment or decision in this case (R. 116, 117).

Jurisdiction of the District Court in the instant case, upon removal from the state courts, rested exclusively upon diversity of citizenship. Under the Rules of Decision Act (Title 28, U. S. C., § 725) and the decision of this Court in *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64, it was error for the courts below to fail to apply the law of Illinois as announced by its highest court.

The same point is presented concerning the holding of the courts below that the defense of an alleged substitution of another person for the named insured at the medical examination was not precluded by the incontestable clause in the policies, the period of contestability having admittedly expired.

The decisions of the Illinois Supreme Court are uniformily to the effect that the defense of fraud in the procurement of a life insurance policy is barred by the expiration of the contestable period specified in the clause required by statute, which contains no exception for fraud of any nature.

Royal Circle v. *Achterrath*, 204 Ill. 549, 559.

Flanigan v. *Federal Life Insurance Co.*, 231 Ill. 399, 401.

Weil v. *Federal Life Insurance Co.*, 264 Ill. 425, 433.

Ramsey v. *Old Colony Insurance Co.*, 297 Ill. 592, 595.

Powell v. *Mutual Life Insurance Co.*, 313 Ill. 161, 165.

The law of Illinois in this respect has been applied by the Court of Appeals for the Seventh Circuit in other cases.

State Mutual Life Assurance Co. v. *Stapp*, 72 F. (2d) 142, 146.

Service Life Insurance Co. v. *Weinberg*, 81 F. (2d) 359.

This question was squarely presented for decision, apart from any question as to the manner of signing the application, by Conclusion of Law No. 2 presented by the petitioner to the District Court (R. 203, 704) which the District Court refused (R. 736) and in which ruling it was sustained by the Court of Appeals.

Moreover, the record plainly shows that the issue as to whether Frank Obartuch knowingly signed the application was voluntarily waived by respondent through its counsel (R. 66), and that the case was submitted for trial by both parties on the sole issue of whether another person was fraudulently substituted for Frank Obartuch at the medical examination. It was therefore error for the Court of Appeals to affirm the judgment of the District Court upon a finding of fact on a matter which was not in issue on the trial and to predicate its decision that the incontestable clause did not bar the defense of substitution upon its conclusion that the policies were void *ab initio* because of the alleged finding that Frank Obartuch did not knowingly sign the application.

Furthermore, the fact, conceded in the Court of Appeals, that the application bore the genuine signatures of Frank Obartuch, made on three separate and distinct dates, the

first and last such dates being nearly two months apart, was sufficient, under the law of Illinois, to show that the policies were not void and that they came into existence as contracts to which the incontestable clause applied.

Provident Life Ins. Co. v. *Fennell,* 49 Ill. 180.
Massachusetts Life Ass'n v. *Sibley,* 158 Ill. 411. 42 N. E. 137.

The Court of Appeals undertook to distinguish the holding in the Illinois cases, to the effect that an insurance company was precluded from disputing the recital in a policy acknowledging receipt of payment of the first premium. The stated ground of distinction was that in such cases the validity of the contract, *i. e.*, the policy, was not in dispute, whereas in the instant case, if the defense of fraudulent substitution was sustained, no contract was brought into existence (R. 743, 744). In this respect, the Court of Appeals disregarded the fact that the defense in such cases was predicated upon the fact that the policy, by its terms, never came into existence as a contract binding upon the company because the first premium had not, in fact, been paid by the insured.

Many cases involving life insurance policies are removed to the Federal courts. The questions here raised present not only a conflict between two Circuit Courts of Appeal on a rule of evidence to be applied in such cases but also the failure of the Federal courts below to apply the law of the state as to the effect of the incontestable clause on the defense of fraud and also the law of the state on such rule of evidence.

PRAYER.

WHEREFORE, your petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Seventh Circuit commanding that Court to certify and to send to this Court for review and determination on a day certain to be named therein, a full and complete transcript of record and all proceedings in the case numbered and entitled on its docket, No. 7059, *Julia Obartuch, plaintiff-appellant* v. *Security Mutual Life Insurance Company, a corporation, defendant-appellee,* and that the said judgment of the Circuit Court of Appeals for the Seventh Circuit may be reversed and that your petitioner may have such other and further relief as to this Honorable Court may seem meet and just.

JULIA OBARTUCH,
Petitioner,

By ROY MASSENA,
DONALD N. SCHAFFER,
Counsel for Petitioner.

Office - Supreme Court, U. S.
FILED
DEC 31 1940
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

No. 663

JULIA OBARTUCH,

Petitioner,

vs.

SECURITY MUTUAL LIFE INSURANCE COMPANY,
A CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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I.

Opinions of Court Below.

The opinions of the Court of Appeals for the Seventh Circuit are reported in 114 F. (2d) 873 (Advance Sheets of November 25, 1940). The first opinion filed on April 12, 1940 is copied in the Record, pp. 735-745, and the additional opinion on the petition for rehearing appears in the Record, pp. 813-817. The dissent of Judge Treanor appears at page 817 of the Record.

II.

Statement of the Case.

This statement has been made in the petition for certiorari filed herewith at pages 1-13, and in the interest of brevity will not be repeated in this brief.

The statement disclosing the basis upon which it is contended that this Court has jurisdiction to review the judgment of the Court of Appeals for the Seventh Circuit, has been made in the petition for certiorari at pages 13 and 14 thereof, pursuant to Rule 38(2) of this Court.

III.

Specification of Errors.

1. The Court of Appeals for the Seventh Circuit erred in sustaining the admission of the testimony of the respondent's medical examiner, Eli Rubens, contradicting the fact, certified by him in the application which was attached to and made a part of the policies in suit, that he saw the applicant sign said application.

2. The Court of Appeals erred in not holding that said testimony of respondent's medical examiner was inadmissible under Illinois law to impeach and contradict statements in documents introduced in evidence by the respondent.

3. The Court of Appeals erred in sustaining the Conclusion of Law entered by the District Court that the incontestable clause in the policies in suit did not preclude the defense that the person examined by the respondent's medical examiner was not Frank Obartuch.

4. The Court of Appeals erred in sustaining the District Court's refusal to hold as a Conclusion of Law that the defense of fraud, including that of substitution of another

person for the insured at the medical examination, was barred by the incontestable clause of the policies under the law of Illinois.

5. The Court of Appeals erred in failing to hold that the record showed that respondent, by its counsel, waived all defenses, including any question as to the signatures of Frank Obartuch on the application, by submitting for trial the sole defense of substitution at the medical examination.

IV.

Summary of Argument.

1. The testimony of the medical examiner Rubens that the person examined by him did not sign the medical questions and answers, Part 2 of the application, in his presence, contradicted Rubens' certificate to that effect in the application, which was attached to and expressly made a part of the policies sued on. The admission of such testimony, sustained by the Court of Appeals, was erroneous, for the parol evidence rule was applicable thereto, as decided by the Fifth Circuit Court of Appeals in *New York Life Ins. Co.* v. *Stewart*, 69 F. (2d) 957. This conflict should be resolved.

2. This testimony contradicted and impeached not only the statement of Rubens in Part 2 of the application introduced by respondent in evidence, but also Rubens' statements in Part 3, which likewise was offered by respondent and received in evidence as its exhibit. Under the decisions of the Supreme Court of Illinois such testimony was incompetent on behalf of the respondent. The law of Illinois, thus announced, should have been applied by the courts below, under the decision of this Court in *Erie R. Co.* v. *Tompkins*, 304 U. S. 64.

3. The sole defense presented for trial by respondent

was the alleged substitution of another person for Frank Obartuch at the medical examination. Under the law of Illinois, this defense of alleged fraudulent procurement of the policies in suit, was barred by the incontestable clause of the policies.

4. The holding of the Court of Appeals that there was no contract in existence to which the incontestable clause would apply was predicated on cases where the imposter not only took the medical examination but also signed the application in another's name. In the instant case, the policies were issued upon an application signed by Frank Obartuch, the insured named therein.

V.

ARGUMENT.

A. The Testimony of the Examiner Rubens Contradicting His Written Statement in the Policies in Suit Was Inadmissible (a) Under the Parol Evidence Rule and (b) Under the Law of Illinois That a Party is Concluded by Documents Introduced as its Evidence.

The judgment of the District Court for the respondent was predicated upon the finding that some person other than Frank Obartuch, the insured, submitted to a medical examination by Dr. Rubens, the respondent's examiner (R. 711). The decision of the District Court rendered orally at the conclusion of the trial dealt solely with that question of fact. This finding necessarily rested upon the testimony of Rubens, who was the only person present at said examination to testify that Frank Obartuch was not the person he examined. The Court gave credence to such testimony, although Rubens saw the person examined only at the examination (R. 134) and his testimony consisted of a denial that a picture of Frank Obartuch shown to him at the trial was that of the man he had examined nearly eight years previous thereto (R. 113).

Rubens was permitted to testify that he did not see the person he examined attach his signature to the medical questions and answers, Part 2 of the application attached to and by the provisions of the incontestable clause made a part of the policies in suit. This was the vital point of the defense of substitution, for the respondent was unable to dispute the fact that said application bore the genuine signature of Frank Obartuch. If, therefore, the respondent is concluded by Rubens' signed declaration in the policy

that he saw Frank Obartuch attach his signature to the application after he had reviewed the answers to the medical questions with Frank Obartuch, as we contend that the respondent is so concluded by law, the entire defense of an alleged substitution for Frank Obartuch at the medical examination collapses.

The Court of Appeals held that the Parol Evidence Rule was inapplicable to exclude Rubens' testimony. In its first opinion, the Court based its conclusion on the ground that the defense was fraud which rendered the contract void *ab initio* (R. 743). After the reargument on the petition for rehearing, the Court in effect conceded that the admission of this testimony could be sustained only by showing that Rubens' signature to his declaration in the application was procured by some fraudulent means or deception (R. 814). The Court then concluded that Rubens had signed as a result of deception and misrepresentation, but its conclusion is expressly stated to be based upon certain "reasonable inferences" from the testimony, or lack of it, as to the circumstances of this examination (R. 814), which are not only unwarranted by the record but wholly contrary to Rubens' own testimony.

The Court reached its conclusion in this respect by inferring that Rubens signed Part 2 of the application at the insurance office the day following the examination, and that "it would seem" that he did so on account of the representation by some person that the signature of Frank Obartuch was that of the same person examined by him the day before, from which it followed that Rubens made this certificate as a result of fraud (R. 814).

The Court conceded that the record was silent as to why Rubens left the application with the person examined, and by whom it was presented to Rubens the following day (R. 814). The Court's conclusion based upon such inferences and lack of evidence should be rejected, without

reference to the fact that it is also contrary to Rubens' own testimony, because it violates established rules as to the proof of fraud.

It was the *respondent,* who sought to prove its alleged defense of substitution by Rubens' testimony contradicting his statements in the policy, and who likewise seeks to avoid the application of the Parol Evidence Rule thereto by claiming that Rubens' signature was procured by deception. Surely the burden was upon the respondent to establish clearly the fraud upon which it relied to render this testimony admissible.

See *Farrar* v. *Churchill,* 135 U. S. 609, 615; and *Jones* v. *Simpson,* 116 U. S. 609, 615, where this Court said that fraud is never presumed and that it devolves on him who alleges fraud to prove the same by satisfactory evidence.

Had the facts been as the Court of Appeals presumed them to be concerning the execution of this certificate by Rubens, the respondent could easily have proved such facts and satisfied the burden of proof of the alleged fraud which the law imposes. For if these applications were delivered to the insurance office the day following the examination, if representations were made to Rubens by some person as to the signature thereon being that of the person examined, and if Rubens *actually* executed this certificate on the day following the examination, it was within respondent's power, and was its duty, to show such alleged facts.

The reason why such proof was not made, and why the inferences drawn by the Court of Appeals are incorrect, is shown by the record in Rubens' own testimony. Rubens testified that all of the medical applications made at the examinations, for both Frank Obartuch and his son Henry, were filled out in his (Rubens') handwriting (R. 106, 107). These documents were introduced *as respondent's exhibits,*

and each of them,[1] including Part 2 of the application of Frank Obartuch was dated by Rubens the "11th day of June, 1931" (R. 119). It was conceded that these examinations took place on June 11, 1931. Indeed, the respondent recalled Rubens in rebuttal to clinch this particular date of June 11, 1931 (R. 675). By the testimony of Rubens and respondent's own documentary evidence it is thus conclusively established that Rubens signed his certificate to Part 2 of Frank Obartuch's application on June 11, 1931, the day of the examination, not on the day following said date. The assumption of the Court of Appeals that Rubens signed this certificate the following day is without foundation and its conclusion, predicated upon such assumption, that fraud and deception were practiced on Rubens to induce his signature is unwarranted.

1. The Holding That the Parol Evidence Rule Did Not Render This Testimony Inadmissible Is in Conflict with the Decision of the Fifth Circuit Court of Appeals in the Stewart Case.

The question presented upon the record here is whether Rubens' testimony should have been excluded under the Parol Evidence Rule. In its first opinion the Court of Appeals stated that there were no authorities cited where the precise question was considered as here presented (R. 743). In the petition for rehearing, we called attention to two such cases, *New York Life Ins. Co.* v. *Stewart* (C. C. A. 5), 69 F. (2d) 957, and *Metropolitan Life Ins. Co.* v. *Alterovitz*, 214 Ind. 186, 14 N. E. (2d) 570. In the additional opinion on rehearing the majority of the Court of Appeals stated that these cases were distinguishable for the reason that in such cases the oral testimony contradicting statements in the application was held inadmissible

[1] See Part 3 of application of Frank Obartuch, Def's. Exhibit 4 (R. 119); Part 1 and Part 2 of application for Henry William Obartuch, Def's. Exhibits 6 and 7 (R. 429, 325).

upon grounds of estoppel (R. 815). One of the reasons for asking this Court to grant the petition for certiorari is that the decision of the Court of Appeals in the instant case is in conflict with the decision of the Fifth Circuit Court in the *Stewart* case on the same matter. We therefore direct our attention to that case exclusively, although the decision in the *Alterovitz* case is to the same effect.

In the *Stewart* case the situation was identical with that here presented, except the party offering the oral testimony was the beneficiary rather than the insurance company. The beneficiary sought to avoid the company's defense of false answers by the insured in the medical application (within the contestable period), by offering the testimony of the medical examiner that the insured was not asked the questions for which such false answers were recorded therein. The application signed by the insured contained the usual certificate that the insured had read the answers and that they were each written as by him as made. The District Court had admitted the testimony of the medical examiner over objection of the company and had rendered judgment for the beneficiary.

The Court of Appeals reversed, holding that this testimony was inadmissible by stating (p. 958):

> "The admission of the above referred to testimony of the medical examiner was erroneous, *as that testimony contradicted the statement in the written instrument evidencing the contract sued on to the effect that the answer to each of those questions was made by the insured.*" (Emphasis ours.)

We cannot conceive of any clearer statement to demonstrate that this holding was grounded upon the Parol Evidence Rule and was therefore squarely in point on the "precise question" here presented.[2] Judge Treanor apparently thought such was the case, for he dissented from the opinion of the Court on the petition for rehearing.

2. By no means controlling, but of some interest is the fact that the headnote on this point in the *Stewart* case is keyed to the topic of the Parol Evidence Rule, (See Fourth Decennial Digest, Vol. 13, p. 1003).

The fact that the majority of the Court of Appeals did not recognize the conflict with the decision in the *Stewart* case requires some attention to the purported distinction found by the majority. It is true that the judgment for the beneficiary was reversed by the Court of Appeals on the further ground that the insured was estopped, by acceptance and retention of the policy containing a copy of the application showing the false answers, to show that those answers were not written as made. But such additional ground for the decision does not warrant the conclusion of the Seventh Circuit Court that the testimony of the medical examiner was held inadmissible in the *Stewart* case on the ground of an estoppel against the insured. The ruling on the admissibility of such testimony was distinctly placed upon the fact that it contradicted the statement in the application which constituted part of the policy sued on. The objection was made on the basis of the parol evidence rule and the decision of the Fifth Circuit Court rested upon that ground. The judgment of that Court reversing the District Court and directing a new trial may be said to rest on both grounds, *i. e.*, the estoppel against the insured and the erroneous admission of the parol evidence contradicting the statement in the policy. In such a case, the decision on either ground is the ruling of the Court and cannot be called mere dictum as to either ruling.

Union Pac. R. Co. v. *Mason City & Ft. Dodge R. Co.*, 199 U. S. 160, 166.

Florida C. R. Co. v. *Schutte*, 103 U. S. 118, 143.

We therefore submit that the decision in the instant case conflicts with the decision of the Fifth Circuit Court of Appeals in the *Stewart* case on the same matter and that certiorari should be granted to resolve such conflict.

2. Rubens' Testimony Impeached Documents Introduced in Evidence by Respondent and Should Have Been Excluded Under the Rule in Illinois Precluding a Party Who Introduces Documentary Evidence from Contradicting It.

The testimony of Rubens should also have been excluded for the reason that it directly impeached and contradicted two documents which the respondent had introduced in evidence as its exhibits without qualification. While this reason is not as impelling as the application of the Parol Evidence Rule, as the rule that a party may not impeach its own documentary evidence is not of universal application (23 Corpus Juris, § 1793, p. 51), it is the unquestioned rule of the Illinois courts. Jurisdiction of the District Court in this case rested exclusively on diversity of citizenship, the ground for removal from the Illinois state court, and under the Rules of Decision Act (Title 28, U. S. C. § 725) and the decision of this Court in *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64, the courts below should have applied the law of Illinois as announced by its highest court.

The respondent has not disputed that the decisions of the Supreme Court of Illinois preclude the impeachment of documentary evidence by the party introducing it. That Court has not only held that parol testimony or other evidence which tends to impeach or contradict documentary evidence is inadmissible when offered by the party introducing such documents (*Schneider* v. *Sulzer*, 212 Ill. 87 at page 95; *Cuneo Press Co.* v. *Industrial Commission*, 341 Ill. 569 at page 572) but in the case of *Nolan* v. *Barnes*, 268 Ill. 515, the Court held that an order of a probate court finding heirship was conclusive upon the party offering it in evidence, although it was said that otherwise the findings therein would be of no probative force because the probate court had no jurisdiction to enter it.

Respondent attempted to avoid the application of this rule to the testimony of Rubens by arguing that *its* Exhibit 5, which is Part 2 of the application containing Rubens' certificate directly contrary to his testimony, was not in actuality *its* exhibit because (a) a photostatic copy of the application had been introduced by the petitioner as a part of the policies sued on and (b) respondent was only interested in offering Part 3 of the application which was on the reverse side of Part 2.

A ready answer to this contention is the fact that the record shows that the respondent offered and the Court received Part 2 of the application in evidence as Defendant's (Respondent's) Exhibit 5 (R. 115, 118-119). Moreover, the Court of Appeals, while disregarding the application of the rule contended for, expressly stated that "Part 2 was also offered by the defendant and received in evidence as its Exhibit 5" (R. 743).

Rubens' testimony, that the signature of the person examined by him was not attached to Part 2 of the application in his presence, likewise impeached and contradicted his statements in Part 3, as to which there can be no quibbling over the fact that it was respondent's exhibit. In that document Rubens reported to his company that he was satisfied that the person he examined was the person represented in the application and that he had no knowledge of any other facts which, if known, would affect the decision in the case (R. 116, 117). The alleged fact that he did not obtain the applicant's signature but rather left these parts of the application with the person examined, so glibly testified to by Rubens, could not be other than an impeachment of his own statement in the report introduced by respondent.

The Court of Appeals failed to consider the application of this rule of the Illinois courts in either of its opinions, although the point was raised and fully argued by both parties. We submit that the Court was in error in failing

to give recognition to the law of the state under which Rubens' testimony should have been held incompetent.

The elimination of Rubens' testimony on either of the grounds urged herein must necessarily result in a reversal of the case for the entry of judgment for this petitioner, for the fact that Frank Obartuch signed this application at the examination, as stated by the respondent's examiner therein, would be conclusive of the fact that he was the person examined by Rubens.

B. Under the Law of Illinois, the Defense of an Alleged Fraudulent Substitution of a Person Other Than the Insured at the Medical Examination Was Precluded by the Incontestable Clause.

It cannot be disputed upon the record in this case that Frank Obartuch, the insured, signed the application upon which the policies were issued. Respondent had alleged in its answer that either some other person signed or that Frank Obartuch did not knowingly sign the application. At the trial, respondent's counsel waived this defense and stated repeatedly that its sole defense was that a person other than Frank Obartuch submitted to the medical examination (R. 64-66), and that it was immaterial to the defense of fraudulent substitution whether Frank Obartuch signed or whether he knew what he was signing (R. 66).

When the issues were so limited to the question of the alleged fraudulent substitution at the medical examination, the petitioner renewed her motion for judgment (R. 102), but that motion and similar motions made during and at the conclusion of the trial were denied by the Court, the Court stating that the respondent was entitled to that defense (R. 104).

The question presented was whether the incontestable clause in the policies (R. 73) barred the defense of fraud

in procuring the policies by the alleged substitution at the medical examination. The decision of that question was dependent on the law of Illinois. That such was the question presented, and that the question was decided without reference to any other factor, such as the alleged lack of knowledge of Frank Obartuch that he signed this application, is shown by the refusal of the District Court to hold Conclusion of Law No. 2 requested by petitioner to the effect that it was the law of Illinois that the incontestable clause barred the defense of fraud, including the defense of substitution of someone else for the insured at the medical examination (R. 703, 704), and by the holding of that Court to the contrary in Conclusion of Law No. 5 submitted by respondent (R. 713).

The Court of Appeals sustained the District Court's refusal to apply the law of Illinois, predicating its decision on the ground that the defense was fraud which rendered the contract void *ab initio* (R. 742). The Court cited several cases where a similar conclusion was reached, but disregarded the important fact that in all of the cases relied upon, the imposter, who took the medical examination, also signed the application in the name of the supposed insured. The decisions in cases, such as *Ludwinska* v. *John Hancock Mutual Life Ins. Co.*, 317 Pa. 577, 178 Atl. 28, and *Maslin* v. *Columbian Nat. Life Ins. Co.*, 3 F. Supp. 368, that the incontestable clause did not apply, were based upon the fact that there was no contract with the person whose name was signed to the application by an imposter, but that if a contract was made it was with the person who actually signed the application in the supposed insured's name.

The instant case is clearly distinguishable for the insured named in the policies, Frank Obartuch, signed the application. He signed not only Parts 1 and 2 of the application on the date of the examination, but also two

amendments on separate dates in the two months following. The finding of the courts below that he signed these documents without knowledge of that fact, was on a matter of defense expressly waived by respondent, through its counsel, at the trial. The case should have been decided upon the issue tendered by the respondent. To hold, under the circumstances shown by this record as to such waiver, that a case may be tried upon the single issue tendered and then after the trial to enter findings on the defense waived by the respondent, is to encourage the violation of engagements solemnly made in a court of law.

The law of Illinois as announced by its highest court is that the incontestable clause of such policies bars the insurer from making any defense against the policies after the expiration of the contestable period, and that even fraud in procuring the policy is not available as a defense to avoid liability thereon.

Royal Circle v. *Achterrath*, 204 Ill. 549, 559.
Ramsey v. *Old Colony Ins. Co.*, 297 Ill. 592, 595.
Powell v. *Mutual Life Ins. Co.*, 313 Ill. 161, 165.

The Seventh Circuit Court of Appeals has applied such law of Illinois in the following cases:

State Mutual Life Assurance Co. v. *Stapp*, 72 F. (2d) 142, 146.
Service Life Ins. Co. v. *Weinberg*, 81 F. (2d) 359.

The conclusion of the Court of Appeals in the instant case that the fraudulent substitution at the medical examination rendered the policies void *ab initio* and that therefore the incontestable clause was inapplicable, does not rest on a rational basis. There is no degree of fraud recognized in these cases. (*Mutual Life Ins. Co.* v. *New*, 125 La. 41, 51 So. 61.) The Seventh Circuit Court of Appeals held in the *Stapp* case that the fraudulent intent of the insured to commit suicide after the contestable period had

expired, did not render the policy void *ab initio,* and was not a defense available to the insurer, saying (p. 145):

> "We do not perceive why such a fraud is any more potent in avoiding a policy than a fraud of any other nature perpetrated by the insured on the insurer to procure the policy, nor why it is any more definitely contrary to public policy than other frauds."

Even if it is held that it was proper to make a finding on an issue expressly waived by the respondent, and assuming therefore that Frank Obartuch signed this application without knowledge that he was applying for these policies, under the circumstances shown by the evidence and admitted by the respondent, the respondent is estopped to claim fraudulent procurement under Illinois law. In *Guardian Mutual Life Insurance Co.* v. *Hogan,* 80 Ill. 35, a son signed his father's name to an application without the father's knowledge or consent. The agent of the insurer who solicited the policy knew that the application had been signed by son. The Court held that the application was not a fraud on the insurer, saying (p. 40):

> "The whole conduct and dealing of the agents with Patrick Hogan (the son) throughout the entire affair, in all its stages, *show too much of privity and knowledge on the part of the agents in respect to the actual facts* (that the father did not know of or consent to the application), to expose the transaction to this implication." (Emphasis and parenthetical remarks ours.)

In the instant case Frank Obartuch signed the application on three different dates. The respondent's agent, Friedman, who witnessed Frank Obartuch's signatures on Part 1 of the application and on the two amendments subsequently executed by Frank Obartuch, must have known that Frank Obartuch did not knowingly sign, if such were the fact, for the respondent charged in its answer (R. 10), and Rubens testified (R. 132), that Friedman introduced Rubens to the person examined by him as Frank Obartuch.

The law of Illinois precluding the defense of fraud was binding upon the courts below, and their refusal to apply

such law is error under the decision of this Court in *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64.

Conclusion.

The questions presented are such as suggest the necessity of the exercise of the supervisory powers of this Court. The decision here conflicts with that of the Fifth Circuit Court of Appeals in the *Stewart* case. The courts below have refused to apply the law of the State of Illinois in this case, where jurisdiction of the Federal court rests solely upon diversity of citizenship.

The case presents issues of importance generally in cases involving life insurance policies, which should be authoritatively determined, as many such cases are removed to the Federal courts. The consequences of a decision such as that rendered by the courts below are far reaching in effect. The courts below hold that, even though an application bears the genuine signature of the person insured, witnessed and certified to by the insurer's agent and medical examiner, the insurer may defend and defeat a recovery on the policy issued on such application, if such medical examiner is willing to testify that the insured, whose signature was declared by such examiner in the application to have been attached thereto in his presence, was not in fact the person he examined. Under such circumstances, no life insurance policy is safe from contest at any time and the incontestable clause, designed to protect beneficiaries from contests where they are placed at a disadvantage, and to prevent dishonest contests, is thus effectually destroyed.

We respectfully submit that the petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit should be granted.

Respectfully submitted,

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PETITIONER'S REPLY BRIEF.

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Couch: Cyclopedia of Insurance Law, 1937 Suppl. to Vol. 8, p. 162 15

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PETITIONER'S REPLY BRIEF.

In an effort to confuse the questions of law presented by the petition for certiorari, respondent devotes most of its brief to a discussion of the testimony in the case, to unwarranted attacks upon the petitioner and her family and to unsupported charges of misstatements of fact by petitioner's counsel. Such of these matters as require an answer will be mentioned in the discussion of the propositions argued in respondent's brief.

I.

Respondent Is Concluded By the Statements of Its Counsel Limiting the Issues For Trial to the Question of Substitution At the Medical Examination and Waiving Its Defense That Frank Obartuch Did Not Knowingly Sign the Application.

Respondent treats the question of waiver of its defenses by limiting the issue for trial to that of substitution as a separate point in its brief. The facts shown by the record on this question were stated in the petition to apprise the Court of the scope of the second question presented in the petition, namely, that under the law of Illinois the defense of a fraudulent substitution for the applicant at the medical examination is barred by the expiration of the contestable period.

The record in this case shows that the trial was had upon the single issue as to the alleged substitution, in accordance with express statements of respondent's counsel so limiting the issues for trial and that at the conclusion of the trial the District Court decided that one issue in respondent's favor (R. 700, 701). Thereafter respondent induced the trial Court to enter findings of fact and conclusions of law predicated upon a defense which had been waived by respondent's counsel. We believe that the case should be reversed upon this showing and we therefore proceed to state the facts concerning this matter which respondent has omitted to state in its purported "full discussion" starting on page 4 of its brief.

Respondent contends that petitioner's counsel initiated the discussion of the scope of the issues at the commencement of the trial. Whether that is so or not, is of no consequence for the real question is as to the position taken on this matter by respondent through its counsel. Respondent's quotations from the record on pages 4 and 5

of its brief are misleading because of omissions of statements made by its counsel. Immediately following the matter quoted, Mr. Bourland, respondent's counsel, expressly limited the issue to the question as to the alleged substitution, in response to a direct question by the Court, as follows:

> "The Court (addressing Mr. Bourland): Is that your understanding, that there is only one issue?
> Mr. Bourland: **Yes, your Honor, the only issue is whether or not they substituted a different person,** * * *." (R. 64.)

Shortly thereafter, Mr. Pearson, one of petitioner's counsel came into the courtroom and was advised that the only issue was the question of the substitution and again respondent's counsel conceded that such was the fact, in response to the Court's statement of that fact (R. 65).

Respondent's contention that its counsel merely indicated that he "was inclined to agree" with petitioner's counsel that it was "immaterial" whether the application bore Frank Obartuch's signature, is wholly misleading due to its deliberate omissions from the record.

Mr. Pearson, counsel for petitioner, during a brief opening statement of the case repeated his understanding that the respondent had limited the issue to the question of substitution and thereby concluded that all other defenses as to the signing of the application were waived. The complete statement in the record on this phase of the case was:

> "Mr. Pearson: * * * I understand now, I not being present at the time, that the company takes the position, that is, the defendant, that **the only question in issue that they now present** is the question as to whether or not there was a substitution of another person in the medical examination. Is that right?
> Mr. Bourland: **That is right.**
> Mr. Pearson: **So that** the question of whether the application bears Mr. Frank Obartuch's signature, and the various exhibits, is not **now** material, * * *." **(R. 66.)**

We believe that any partisan argument attempting to interpret these statements is redundant. Not only did respondent's counsel limit the issue for trial as above set forth, but in his opening statement he expressly waived any defenses attacking signatures to the application and, in particular, as to Frank Obartuch's lack of knowledge of what he was signing. To emphasize respondent's sole reliance on the defense of substitution, its counsel stated that it was immaterial to its defense even though Frank Obartuch "knew what he was signing" if "somebody else took the examination" (R. 66). It is not surprising that the respondent makes no reference in its brief to this statement waiving all defenses other than the alleged substitution. After the trial was had upon the one issue so presented and after the Court had orally decided for the respondent, its counsel submitted a finding, which the Court entered over petitioner's objection that it was not an issue in the case (R. 706), to the effect that *if* Frank Obartuch signed the application, he did not sign the same knowingly (R. 711).

Finally, respondent now says that petitioner's claim of waiver of this defense as to the signing was not made in the trial court, but first discovered in the Court of Appeals. A ready answer is that it was not necessary to advise the trial Court of the statements constituting a waiver which were made in that Court's presence. However, respondent's statement here is untrue. The record shows that petitioner's counsel objected to the findings and conclusions submitted by respondent's counsel, and called the attention of the trial Court to the waiver by respondent of all questions as to the signatures on the application, with which the trial Court agreed and then added:

> "The Court: There is no question about his signature." (R. 705.)

After the Court overruled petitioner's objections to the

findings submitted by respondent, petitioner's counsel again called attention to the limitation of the issue and waiver of all defenses other than that of substitution (R. 706).

It is almost inconceivable that a court would enter such findings and conclusions on defenses expressly waived by the respondent, and that an appellate court on the record showing in this case would conclude, albeit somewhat hesitantly, that the "issue as to signing was not waived" by respondent (R. 739). Even though such conclusions might find some support (which we do not concede), the fact remains that counsel for the petitioner tried the case on a single issue in reliance upon statements of respondent's counsel to which the trial Court acceded, and then at the conclusion of the trial they were confronted with findings of fact and conclusions on issues which they had reason to believe not to be involved in the trial.

In this respect we submit that petitioner did not have a fair trial and that the judgments below amount to a denial of due process of law sufficient to warrant reversal by this Court.

II.

The Admission of Rubens' Testimony Denying the Facts Certified by Him in the Policy Cannot be Justified by Mere Statements or Inferences That He Was Induced to Execute Such Certification by Deception and Misrepresentation.

Respondent seeks to excuse its failure to sustain its burden of proving that its examiner Rubens was induced by deception or fraud to execute a certificate, which he testified was false in that he did not see Frank Obartuch sign the application which he certified to as having been signed in his presence. Rubens' testimony is condemned

by the excuse offered by respondent for his alleged conduct, when respondent asserts that it is a common practice of frequent occurrence for signatures to be witnessed "without sufficient assurance that they have been signed by the persons purporting to sign them." (Brief, p. 14.)

The fact is, and there is nothing in this record to the contrary, that no assurance was given or representation made to Rubens that Part 2 of his application was signed by Frank Obartuch. It inevitably follows that Rubens executed his certificate on his own responsibility without any deception or misrepresentation as to the facts stated therein by anyone connected with the insured. Rubens certified to his company and to the insured that the person examined signed the application in his presence and the proof showed, without any contradiction, that the signature was that of Frank Obartuch. Therefore, upon every principle of law and logic it was Frank Obartuch who was examined by Rubens.

The only fraud which the record shows in this situation is the attempt of Rubens to deny the facts which he stated over his signature. The respondent now argues (p. 20) that Rubens did not execute this certificate in Part 2 at the time of the examination and *on the date which he inserted, June 11, 1931,* but that it must have been signed the following day which would be June 12, 1931, because the results of the urinalysis were inserted in Part 3 on that date, although it also is dated by Rubens, June 11, 1931. There is not an iota of evidence to support this supposition. Respondent's desperate attempt to excuse its examiner's "failings" tends to establish the truth in this case more clearly than the evidence in the record.

Respondent's position that it proved that a person other than Frank Obartuch submitted to the examination by

Rubens, consist of the following remarkable "facts" and contentions:

1. Respondent charged under oath that Rubens was deceived by its agent Friedman who falsely represented to Rubens that an unknown person whom Rubens examined was Frank Obartuch (R. 10). Rubens so testified (R. 132) but Friedman, as respondent's witness, denied this alleged fact (R. 333).

2. Rubens certified above his signature in Part 2 of the application, expressly made a part of the policies in suit, that he saw the applicant attach his signature thereto and that before the applicant signed he reviewed the answers which Rubens had inserted (R. 119). Rubens, as a witness, denied that the applicant's signature (admittedly that of Frank Obartuch) was made in his presence (R. 122).

3. Rubens testified that all of the writing on Part 2 (except the signature of Frank Obartuch) and on Part 3 was his handwriting (R. 107). On cross-examination, Rubens testified that after he wrote Part 2 in his handwriting, he left it with the person examined and that he next saw it the following day at the insurance office (R. 130). Since Part 3 was on the reverse side of Part 2 (R. 115) he also left his confidential report with the applicant, in completed form, except for his findings on the examination of a specimen of urine (R. 124), including his unqualified recommendation of the applicant for insurance (R. 117).

4. In the face of these facts and a total absence of any testimony disputing the dates on the applications, respondent contends that Rubens must have executed Parts 2 and 3 of the application on the day following the examination, not on the date he inserted therein, and from this respondent infers (as did the Court of Appeals) that someone (not disclosed) must have represented to Rubens that the signature of the

applicant was that of the person he examined the day before. It follows, contends the respondent, that while Rubens may have been indiscreet, he did not contradict his certificate, but if he did, he is permitted to testify to the "true" facts, because he must have been deceived by some person's representations that the certificate, which supposedly he then executed and dated back, stated the facts (namely, that the person he stated he didn't see sign, but whom he certified he did see sign, was the person he examined and the one who signed the application, but that since Frank Obartuch signed the application, he did not examine Frank Obartuch).

The issue presented in this case cannot be determined as the Courts below have decided it, unless full credence is given not only to the contradictory and incredible statements of Rubens, but also to the unwarranted inferences and suppositions advanced by respondent in its brief.

This somewhat lengthy review of this phase of the case serves to emphasize the soundness of the principles of law applicable to exclude Rubens' testimony. The parol evidence rule was first invoked to render incompetent such testimony and inferences as are here presented by respondent. It should have been applied by the Court of Appeals and its decision holding it inapplicable is in conflict with that of the Fifth Circuit in *New York Life Insurance Co.* v. *Stewart*, 69 F. (2d) 957, upon an analogous state of facts.

Respondent resorts to a legal contention which is as inapplicable to the facts here, as its factual inferences are unwarranted. Respondent says that Rubens' signature to the certificate in Part 2 "was attached merely as a testimonial" and then it invokes the rule that "an attesting witness may always impeach his attestation." Such a contention does violence to the facts in the record and indi-

cates little regard for the Court's comprehension of such facts.

Rubens was not an attesting witness to a document executed by other parties. He was the authorized agent of the respondent who was required as part of his duties to certify certain facts concerning their performance. That certification was printed on a form prepared by respondent for use by one charged with the duty of following its explicit directions. That certification was expressly incorporated as a part of the contract between the parties, in a policy form also prepared by respondent, and thus it became a representation of the facts concerning the signing of the application, not only to the respondent, but also to the insured and his beneficiary, the petitioner here.

The rule of law applicable to such facts is the time-tested rule which prevents a party (and its agent) from contradicting the provisions of a written contract. The rule as to attesting witnesses does not have the slightest application to this situation.

III.

Respondent Cannot Contradict the Record, or Now Limit the Unqualified Introduction of Its Exhibits, in Order to Avoid the Application of the Law of Illinois Precluding Its Impeachment of Its Own Documentary Evidence.

Respondent struggles to avoid the application of the law of Illinois under which the testimony of Rubens impeaching his own statements in Parts 2 and 3 of the application is rendered inadmissible. These parts of the application were offered by respondent and received in evidence as its exhibits 4 (Part 3) and 5 (Part 2).

Respondent contends (a) Part 2 was not respondent's exhibit, the record to the contrary notwithstanding, (b)

Part 3 was not impeached by Rubens, for it was offered to sustain his denial that he examined Frank Obartuch, and (c) the law of Illinois does not preclude a party from impeaching documentary evidence it introduces, for none of the cases cited is well considered and the weight of authority is contra such cases.

Part 2 was offered and received in evidence as Respondent's Exhibit 5. The record so shows (R. 118, 119), the Court of Appeals so held (R. 743) and in that Court the respondent entered into a stipulation (R. 726, 728) directing the clerk to print in the record the following statement, which respondent now implies (p. 19) was improperly inserted in the record by the stenographer or by petitioner's counsel:

> "Defendant's [Respondent's] Exhibits 4 and 5 are respectively part 3 and part 2 of the application of Frank Obartuch, the originals of which are on opposite sides of the same paper. The following are photostatic copies of said Exhibits 4 and 5." (R. 115.)

The record on appeal imports verity; it cannot be contradicted by an affidavit of counsel (*Johnson* v. *United States*, 225 U. S. 405, 411), nor by a certificate of the clerk of the court below outside of the record certified by such clerk (*Hudgins* v. *Kemp*, 18 How. (59 U. S.) 530, 534). Surely, mere statements of counsel in a brief will not suffice to overcome the recitals of the record itself, the statement of the Court of Appeals and counsel's own stipulation in that court.

Mental reservations of counsel concerning their purpose in offering an exhibit or unstated limitations on such offer are likewise ineffective, where the record shows no qualification or limitation of the offer, either when made or at any other time. Respondent's suggestion that it was useless for it to offer the original of Part 2 as its exhibit, since a copy of Part 2 of the application was attached to the policies offered by the petitioner, falls in this category.

Moreover, there is a vast difference between the offer of a complete contract containing a copy of an original document and the original of that document containing the signatures of the parties.

Since Ruben's testimony flatly contradicted his own statement in Part 2, as even the respondent concedes (Brief, pp. 19, 20), the only question is as to the law of Illinois cited by petitioner. Respondent argues, largely upon the ground we did not discuss the Illinois cases cited (for the reason that respondent had not heretofore disputed the Illinois law) that none of the Illinois cases is a well considered opinion, and that there is a conflict of authority, from which respondent assumes that the weight of authority is against these Illinois cases. In passing, we refer to page 11 of the petitioner's brief where we discussed the holding in *Nolan* v. *Barnes,* 268 Ill. 515 at page 521. However, we are not concerned with the question whether the law established by these Illinois decisions is sound or in accord with that in the majority of other jurisdictions, but we do not contend that the law as declared by the highest court of Illinois must be given effect by the Federal Courts in a case removed to such courts from the state courts in Illinois. Such is the principle announced by this Court in *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, as we understand it, and as that case has been followed in subsequent decisions of this Court. In *Vandenbark* v. *Owens-Illinois Glass Co.,* 85 L. Ed. (Adv. Ops.) 317, it was held that the Circuit Court of Appeals must apply the state law as declared by the highest court of the state at the time of its decision, even though the decisions of the state court were to the contrary when the case was decided by the District Court. See also, *West* v. *American Telephone & Telegraph Co.,* 85 L. Ed. (Adv. Ops.) 146, where this Court held that the decision of an intermediate appellate state court was binding on the Federal Courts in a case in which jurisdiction rested ex-

clusively on diversity of citizenship, even though the Federal court was of the opinion that the decision of the state court was wrong.

The record also shows that Rubens' testimony contradicted his statements in Part 3 of the application. Respondent asserts the contrary, without discussing the statements which obviously are those impeached, namely, that Ruben was satisfied that the person examined was the person represented in the application (R. 116) and that he had no knowledge of any facts other than those stated which would affect the decision on the application (R. 117). Respondent now states that its purpose in introducing Part 3 was to sustain Rubens' description of the person he examined and that the description in Part 3 as recorded by Rubens during the examination did not correspond with the description of the real Frank Obartuch as given by respondent's witnesses.

In this connection, respondent indulges in some fanciful speculation and in intentionally prejudicial statements that petitioner and her witnesses have an aptitude for perjury, from which respondent deduces that if petitioner had seen Part 3 before its counsel caught petitioner "unawares" by introducing it, her witnesses would have made their description of Frank Obartuch correspond with that in Part 3.

The fact is that petitioner's witnesses described Frank Obartuch as he was described in Part 3, and the alleged discrepancies came from biased and interested witnesses for respondent. Moreover, it was respondent who was surprised in the last analysis, for while even honest witnesses may differ as to the physical characteristics of a person well known to them, the petitioner produced an unimpeachable record containing a description of Frank Obartuch made by government officials long before this controversy was thought of. We refer to the Naturalization Certificate of Frank Obartuch issued by the Circuit Court of the United

States on February 4, 1909, wherein his height is stated as 5 feet 10 inches; color of eyes, brown; and color of hair, brown (R. 442), and we note that the description of the person examined by Rubens, as recorded in Part 3, conforms thereto, except that the height is there recorded as 5 feet 9 inches (R. 116), which may be accounted for by a natural stoop due to the 22 years difference in time of these two records. Again, we justify our extended discussion of this matter as necessary to answer respondent's unjustifiable attempts to prejudice this Court and we submit that respondent is "hoist with its own petard." We cannot refer to each of the prejudicial statements, which are without support or grossly extorted by respondent, but illustrative of all is the concluding statement in respondent's brief, where it asserts that Frank Obartuch "*never* desired to have $20,000 of insurance payable to his widow *from whom he was estranged,*" whereas the record shows that the so-called estrangment (which followed his arrest for beating the petitioner) took place over two years after these policies were issued.

IV.

Under the Law of Illinois the Defense of a Fraudulent Procurement of the Policy by a Substitution for the Applicant at the Medical Examination Is Barred by the Incontestable Clause.

Respondent's argument on this point is limited, as the issue was limited for trial, to the defense of the substitution of a person other than the applicant at the medical examination. Since respondent has reverted to its original position that substitution alone is a complete defense "notwithstanding the incontestable clause", we need not again consider the fact that the issue for trial was limited to this single question. The premise for this particular question

upon the record showing is that the application was made and signed by Frank Obartuch. What then is the effect of the incontestable clause in the policy on the asserted defense that the contract with Frank Obartuch was procured by fraud in that some other person substituted for Frank Obartuch at the medical examination?

Respondent argues this question from a negative viewpoint. It boldly asserts that *all* the decided cases, *all* the text writers and annotators have taken the same view, namely, that the defense of substitution may be presented although the contestable period has expired, and that there is no decided case holding that it makes the slightest difference whether the imposter or the named insured signed the application.

In the first place, in all of the cases cited in the opinion of the Court of Appeals and relied upon by respondent, the imposter not only submitted to the medical examination but actually made the application by forging the insured's name. See *Ludwinska* v. *John Hancock M. L. Ins. Co.*, 317 Pa. 577, where imposter was the sister of an imbecile and signed the imbecile's name to the application; *Maslin* v. *Columbian Nat. Life Ins. Co.*, 3 F. Supp. 368, where the Court stated that the "defense is that an imposter posing as Samuel Maslin made the application"; and the Illinois case cited by respondent, *Valant* v. *Metropolitan Life Ins. Co.*, 302 Ill. App. 196 at page 199, where the question was "whether the incontestable clause can be invoked *where the person making the application* and submitting to the medical examination impersonates another."

The reason given in these cases for the non-applicability of the incontestable clause shows that the forgery of the application by the imposter rather than the substitution of a person other than the named insured at the medical examination is the predicate of these decisions. The reason stated is that no contract with the named insured came into

existence because the insured did not execute the application and hence there is no incontestable clause to apply. This distinction based upon the imposter having signed the application is recognized, contrary to respondent's assertion, in the cases and by text writers and annotators cited by respondent.

In the *Ludwinska* case the Court held that the forgery of the imbecile's signature on the application was the controlling factor. The annotator of the case, in the headnote thereto, and Couch (cited also by respondent) in his Cyclopedia of Insurance Law (1937 Supp. to Vol. 8, p. 162), both view this decision as not being controlled by the impersonation at the medical examination, for each says:

> "If one, or another by his authority, applies for life insurance, the impersonation of him by another in the medical examination is a matter of defense to which the incontestable clause applies."

In the instant case it cannot be disputed upon the record that Frank Obartuch signed the application in two parts, and two amendments thereto on different dates. It follows that the contract so made with Frank Obartuch cannot be contested for fraud in the alleged substitution of another person at the medical examination, where the incontestable clause bars all defenses of fraud in the procurement of such contract after the specified period has rrn. Such is the law of Illinois and the Courts below erred in refusing to follow the law declared by the highest court of Illinois on this proposition. (See cases cited in Petitioner's Brief, p. 15.)

The rule contended for is sound and will preserve the purpose and public policy intended to be effected by the incontestable clause, that of preventing contests by an insurer seeking to defeat its liability, after it has accrued by the insured's death, and where the beneficiary is at a disadvantage to dispute alleged fraud that the insurer has failed to discover within the reasonable period allowed for investigation. Such a rule will not expose insurance

companies to liability upon contracts made with an imposter, for the means of detection are provided by and available to the insurer even after the named insured's death. A mere comparison of the signature on the application with a genuine signature of the named insured will disclose the impersonation, and the incontestable clause will not preclude the defense that the contract is with the imposter who signed the application.

On the other hand, the rule for which respondent contends nullifies the incontestable clause by opening the door to fraudulent contests of liability after the expiration of the contestable period. Under such a rule, liability on any policy can be defeated provided the examiner will, or can be induced to, testify that he did not examine the insured and did not see the applicant attach an admittedly genuine signature to the medical questions and answers, as the respondent's examiner Rubens testified in this case.

Conclusion.

The questions presented by the petition for certiorari are of importance in the law of insurance, and in the application of the rule of *Erie R. Co.* v. *Tompkins*. A clear conflict is shown between the decision of the Court of Appeals in this case and that of the Fifth Circuit Court of Appeals in the *Stewart* case as to an important rule of law, which conflict should be resolved by this Court.

We respectfully submit that the petition for a writ of certiorari should be granted, and that the judgments below should be reversed.

Respectfully submitted,

Roy Massena,
Donald N. Schaffer,
Counsel for Petitioner.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

No. 663

JULIA OBARTUCH,

Petitioner,

vs.

SECURITY MUTUAL LIFE INSURANCE COMPANY,
A CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITION FOR REHEARING.

ROY MASSENA,
DONALD N. SCHAFFER,
Counsel for Petitioner.

THE BLAKELY-WARREN PRINTING COMPANY, 810 WEST JACKSON, CHICAGO

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PETITION FOR REHEARING.

To the Honorable Charles Evans Hughes, Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Comes now the above-named petitioner, Julia Obartuch, and presents her petition for a rehearing of the petition for certiorari in this case.

The petition for certiorari was filed December 31, 1940, and was denied on March 3, 1941. This petition is filed within less than twenty-five days thereafter, under Rule 33.

Reasons for Petition for Rehearing.

Petitioner is frank to state that, in filing this petition for reconsideration of the order denying certiorari, she is motivated by self-interest to secure a review of the judgments below by which she has been deprived of more than $20,000 of insurance on her husband's life and for which nearly $5,000 in premiums was paid to the respondent company in less than three and one-half years.

Petitioner is aware, however, of the fact that the purpose of review by certiorari in this Court is not to give the defeated party another hearing, but to secure uniformity of decision and to bring up cases of public importance. (*Magnum Import Co.* v. *Coty,* 262 U. S. 159.) On re-analysis, it is believed that the petition for certiorari and the supporting brief, in reliance upon the apparent conflict between circuits, did not adequately emphasize the intrinsically important question raised upon this record as to the construction of the incontestable clause in the policies in suit.

The judgments below denying recovery on these policies nullified the declared purpose and effect of the clause providing that the policy *and the application therefor* shall be incontestable after two years (R. 73, 74). This result was predicated upon the acceptance of the testimony of respondent's medical examiner denying that he had examined the insured, Frank Obartuch, by permitting such examiner to contradict orally his own signed statement in the policy that he had examined Frank Obartuch, whose genuine signature was attached to the medical application so authenticated by this examiner's certificate.

The decision of the Court below holding admissible the testimony of this examiner denying his certificate in the policy seemed to present a clear conflict with the decision of the Fifth Circuit Court of Appeals in *New York Life Ins. Co.* v. *Stewart,* 69 F. (2d) 957, 958. In presenting this

conflict as a reason for granting certiorari, we overlooked the fact that the question presented was one controlled by state law, as to which conflict among circuits is not of itself a reason for granting certiorari. (*Ruhlin* v. *New York Life Ins. Co.*, 304 U. S. 202, 206.)

The Controlling Question.

The controlling question is therefore not primarily one of conflict among circuits but whether the decision of the Court below permitting the respondent to contest the provisions of the policy and application was probably in conflict with applicable decisions of the Illinois courts interpreting such incontestable clauses.

The Decision of the Court Below Is in Conflict with Applicable Decisions of the Illinois Courts.

The contest of a life insurance policy *containing an application signed by the insured,* after the lapse of the two year period of contestability, for alleged substitution at the medical examination, is precluded by decisions of the Illinois Supreme Court. In the following cases it was held that the defense of fraud of any nature in procuring the policy is barred by the incontestable clause.

Royal Circle v. *Achterrath*, 204 Ill. 549, 559;
Ramsey v. *Old Colony Life Ins. Co.*, 297 Ill. 592, 595;
Powell v. *Mutual Life Ins. Co.*, 313 Ill. 161, 165.

To establish its defense of alleged fraud in the medical examination, respondent not only contested the policy but was permitted to deny (by its examiner's testimony) the truth of its examiner's signed certificate expressly incorporated in the policy. By the incontestable clause (in addition to the Parol Evidence Rule), under Illinois decisions, the respondent is estopped to deny the facts recited over

its agent's signature in the policy, viz. that Frank Obartuch was examined and that he signed the medical application in the presence of the examiner. This principle is applied in decisions holding that an insurance company may not show that the first premium was not in fact paid (payment being a condition precedent to the validity of the contract by its terms) where the policy recites and acknowledges receipt of such payment.

Provident Life Ins. Co. v. *Fennell,* 49 Ill. 180;
Massachusetts Life Ass'n v. *Sibley,* 158 Ill. 411.

While the Illinois Supreme Court has not applied the incontestable clause in the precise factual situation here presented, its decisions construing such clauses as meaning incontestable in fact for any fraudulent procurement are applicable. The decision of the Court below is in conflict with such applicable decisions.

Public Importance.

The question here presented is important for the following reasonings:

(a) It involves the application of the decision in *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, that decisions of the State court are binding upon the Federal courts on a question of state law and public policy.

(b) It concerns the enforcibility of insurance contracts in a case when the value of the incontestable clause is destroyed by permitting a contest for fraud contrary to the express language of that clause and the decisions of the State court applying such clauses.

(c) As decided by the Court below it allows an insurance company to defeat liability upon an incontestable contract in any case where its medical examiner will testify that his signed certificate to the medical application incorporated in the policy is false, as the predicate of his testi-

mony that he did not examine the person who signed that application.

In these respects, especially the latter, the record presents a question of extreme importance to the public generally and not an attempt to secure a further review by the defeated party below. Whether parol evidence is admissible to contradict the provisions of a contract is only one phase of the broader question of the effect of the incontestable clause as precluding the contest of the policy and the contradiction of its provisions by which recovery was denied in this case.

For the foregoing reasons, petitioner respectfully urges that a rehearing be granted; that upon further consideration the order of March 3, 1941 denying the petition for certiorari be revoked; and that the writ of certiorari issue.

ROY MASSENA,
DONALD N. SCHAFFER,
Counsel for Petitioner.

CERTIFICATE OF COUNSEL.

I, DONALD N. SCHAFFER, one of the attorneys for the above-named petitioner, do hereby certify that the foregoing petition for rehearing of this cause is presented in good faith and not for delay.

DONALD N. SCHAFFER.

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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THE GUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

No. 663

JULIA OBARTUCH,

Petitioner,

vs.

SECURITY MUTUAL LIFE INSURANCE COMPANY,
A CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

SUMMARY OF ARGUMENT.

There are statements and arguments in the petition for certiorari which have not been re-argued in petitioner's brief. Logically, it seems best to answer first, the petition upon the facts and the law, then, to answer petitioner's

brief,—which we trust will be for the convenience of the Court.

We shall not cover the contentions or authorities discussed by the Circuit Court of Appeals because they are adequately answered in its opinions.

There are material misstatements of fact by petitioner and unwarranted inferences drawn therefrom; we shall call attention to some of the more important.

We shall show:

I.

THERE WAS NO LIMITATION OF THE ISSUES FOR TRIAL.

A. The only "limitation" was the repeated statement of plaintiff's attorneys that it was immaterial whether Frank Obartuch signed or not. As a matter of law, plaintiff could not change her position in the Court of Appeals and claim that the fact was material.

B. If Frank Obartuch did not knowingly sign, with understanding of the contents of the document, such a document is disregarded everywhere.

C. It is against public policy to allow one person to have insurance on the life of another, without the knowledge or consent of the latter.

D. The case being tried without a jury, the findings of the trial court must be taken as true.

II.

THERE WAS NO ERROR IN ADMITTING DR. RUBENS' TESTIMONY THAT THE APPLICATION WAS NOT SIGNED IN HIS PRESENCE.

A. There is a well recognized exception to the Parol Evidence Rule, that documents may be impeached for fraud.

B. Dr. Rubens' signature was attached merely as a testimonial; an attesting witness may always impeach his attestation.

III.

DR. RUBENS' TESTIMONY DID NOT IMPEACH DOCUMENTS INTRODUCED BY DEFENDANT-RESPONDENT.

IV.

THE DEFENSE OF SUBSTITUTION OF A PERSON OTHER THAN THE NAMED INSURED AT THE MEDICAL EXAMINATION, IS NOT PRECLUDED BY THE INCONTESTABLE CLAUSE UNDER THE LAW OF ILLINOIS OR ELSEWHERE.

A. Insurance companies insure lives, not names. Where there is a fraudulent substitution, if there is a contract it is with the person examined,—rather than with the person fraudulently named.

B. Where there is a mistake respecting the identity of a party to a contract, this is sufficient to invalidate it.

V.

PETITIONER HAS NOT SHOWN GROUNDS FOR THE ISSUANCE OF A WRIT OF CERTIORARI.

I.

There Was No Limitation of the Issues for Trial.

The Court of Appeals considered this point as a question of fact, and decided it against the plaintiff-petitioner, quoting some of the record in a footnote (R. 738-9). The question was again reargued in plaintiff's petition for rehearing (R. 776, *et seq.*), and in the reply thereto (R. 803, *et seq.*).

If the question is to be reconsidered, we think it should be in the light of the full discussion.

Defendant did not initiate the talk as to whether it was material if Frank Obartuch signed the application. Michael Obartuch (plaintiff's son and one of her attorneys) began it. At the very start of the trial he said (R. 63):

> "Mr. Obartuch: Judge, I think it is all a question of law.
>
> "The Court: No, it is not. As I recall it, when I wrote those memoranda here, isn't it the case in which it was the claim of the defendant that they did not insure the man who was named in the policy, but someone else who was substituted for examination.
>
> "Mr. Bourland: Yes.
>
> "The Court: That is **one** of the defenses.
>
> "Mr. Bourland: That is right.
>
> "The Court: I remember that.
>
> "Mr. Bourland: Your Honor held with us on that, that that would constitute a defense, if we proved it.
>
> "The Court: Yes.
>
> "Mr. Bourland: And that is the **principal issue** in the case, whether we can prove it to your Honor's satisfaction.
>
> "The Court: I think I would want the advice of a jury in the matter.
>
> "Mr. Obartuch: Judge, I think in this case, under the rule of pre-trial practice, if what they say is true, **we need only submit one matter** to the Court, and if either one of us prevails on it I think that will eliminate the rest of all of the other things that are involved.

> That is about as I understand it, their only contention, is as to the substitution of a body. They do not contend that he did not sign it and I think under the pretrial practice that we can eliminate that and have the one issue tried and dispose of it in that way and save the court time."

A few minutes after Mr. Pearson came into the court room, he again brought up the matter and stated that it was "immaterial" whether the application "bears Mr. Frank Obartuch's signature" (R. 66). The defendant merely indicated that it was "inclined to agree" with these statements, that this fact was immaterial (R. 66). In other words, it was the plaintiff who undertook to limit the issue, not the defendant.

Then, as the Court of Appeals points out (R. 738-39) in the opening statement for the defense, it was plainly stated that the defendant did not know whether it was the genuine signature of Frank Obartuch or not, but that if he did sign the papers, he did not know what he was signing (R. 738). Again, before the examination of plaintiff's first witness this occurred (R. 97):

> "Mr. Pearson: Now, I would like to ask you further, counsel: In the statement at one time you intimated there was not any question about what Mr. Obartuch signed these various papers. Is there any question about that?
>
> "Mr. Bourland: I have never stated that. I have always said it was either a forgery or else he did not know what he was signing.
>
> "Mr. Pearson: Very well.
>
> "Mr. Bourland: I don't know which is true."

There were many other occasions upon which defendant's attorney, in the trial court, stated that the issue was whether Frank Obartuch knowingly signed. See collection of instances in reply to petition for re-hearing. (R. 803-4.)

Plaintiff first discovered this claim of waiver of defense when this case reached the Circuit Court of Appeals; it was not made in the trial court.

Defendant's counsel never did more than agree with plaintiff's attorneys that it was immaterial, as a matter of law, whether it was a genuine signature or not, the defendant contending at all times that if Frank Obartuch did sign, he did not know what he was signing. The trial court made a special finding of fact that if Frank did sign, he did not sign knowing the contents of the documents or with the intention of obtaining insurance from defendant company (R. 711, finding No. 2), also the following findings:

> "3. That the real Frank Obartuch, husband of the plaintiff herein, did not desire to take out insurance upon his life with the defendant company; that the policies were obtained by the sons of the said Frank Obartuch, and the plaintiff herein, without the knowledge or consent of the said Frank Obartuch and that the said Frank Obartuch died without knowledge that said insurance policies purporting to insure his life, had been issued. (R. 711-12.)
>
> * * * * *
>
> "7. That the plaintiff by agreement with her sons Michael Obartuch and Henry Obartuch and daughter Matilda Wiczas, obtained the policies in suit by the substitution of a person other than Frank Obartuch, which said person submitted to the medical examination of the defendant's doctor without the knowledge or consent of Frank Obartuch." (R. 712.)

A. When the plaintiff contended in the trial court that it was there immaterial whether Frank Obartuch signed or not, we submit that plaintiff could not change her position in the Court of Appeals and in this court and contend that it is here material.

In *Gering, et al.* v. *Leyda,* C. C. A. 8th, 186 Fed. 110, a similar attempted switch in positions was dealt with (pages 113-14):

> "The defendants below, by objecting to the proof of indebtedness of the bankrupt on the ground that such proof was immaterial and obtaining a ruling sustaining this objection, estopped themselves from claiming that evidence of such indebtedness was requisite to sustain the trustee's cause of action; notwithstanding

this ruling, sufficient evidence crept into the case to constitute substantial evidence of indebtedness of the bankrupt to general creditors not secured. * * *

"* * * If the showing made by the trustee in the trial court as to the extent of the bankrupt's indebtedness to general creditors was not as full as it might have been, the plaintiffs in error are not in a position to complain of the lack of evidence on this subject, for the trustee offered evidence tending to show the indebtedness of the bankrupt at the time of the transfer complained of, and plaintiffs in error objected to the admission of the evidence on the ground that it was immaterial and obtained from the trial court a ruling sustaining their objection. By taking this course the plaintiffs in error estopped themselves from claiming that evidence of the indebtedness of bankrupt to general creditors at the time he transferred his stock of goods to them was necessary to sustain the trustee's cause of action."

See also:

Standard Varnish Co. v. *Jay*, 149 Ill. App. 25-29.

The only evidence in this case as to whether or not it was really plaintiff's signature, in like manner, "crept into the case" when Matilda Wiczas, plaintiff's daughter, was on the stand (R. 98). Defendant introduced no testimony on the subject. Plaintiff's Exhibits 1 and 2, being the insurance policies, which contained photostatic copies of parts 1 and 2,—constituting the application for the policies—were introduced in evidence without objection, by the defendant. Mrs. Wiczas was asked whether the signature was her father's signature, under the guise that plaintiff might want to "call a handwriting expert" (R. 100). None was called.

Mrs. Wiczas was not a credible witness because she was one of the witnesses who testified she was present and that the man examined by the doctor was Frank Obartuch (R. 449). She was one of the witnesses referred to by the trial judge when he said "The testimony of many of the witnesses for the plaintiff is reeking with perjury" (R. 702).

The testimony of a perjurer certainly adds nothing worth while to the record.

We agreed with plaintiff's statement of the law that it was immaterial whether Frank Obartuch actually signed the application, for it would be strange law to hold that it made any difference if a man signed a document, if he did not do it knowingly.

The law is all to this effect.

B. A paper which is not signed knowingly with understanding as to its contents, is void and is disregarded everywhere.

In *Babcock* v. *Farwell,* 245 Ill. 14, at page 40 the Court said:

> "It is insisted on behalf of the appellant that it is not necessary in order to avoid a release obtained by actual fraud, to return the consideration therefor. This is true where the fraud was in procuring the execution of the release,—that is, where the party was induced to execute the instrument not knowing it to be a release but believing it to be an instrument of a different character. A release so obtained is void. (*Indiana, Decatur and Western Railroad Co.* v. *Fowler,* 201 Ill. 152.)"

The Court pointed out that in such case no contract was entered into and the release was absolutely void, saying:

> "In the former case no contract was entered into. The release was not the deed of the party signing it because **it was not knowingly executed by him.** It was void and no necessity existed for setting it aside. It might be disregarded anywhere."

We also cite to support this fundamental principle:

Sims v. *Bice,* 67 Ill. 88.

13 C. J., Section 252, page 373.

17 C. J. S., Section 140, page 495.

Ford Motor Co. v. *Pearson,* C. C. A. 9th, 40 F. (2d) 858, 867.

Williston on Contracts (1920 Ed.), Vol. III, Section 1488, page 2648.

C. It is against public policy to allow one person to have insurance on the life of another, without the knowledge or consent of the latter.

In *Metropolitan Life Ins. Co.* v. *Monahon,* 102 Ky. 13, 42 S. W. 924, Monahon brought action against the insurance company to recover money paid by plaintiff's wife to defendant company as premiums on a policy issued by the company on Monahon's life for the benefit of the wife. Plaintiff contended that the policy was issued and the premiums paid without his knowledge or consent; that he never had made any application for such policy, never had been examined by any physician and that his wife had paid the premiums with his money. On the question as to whether or not the policy had been issued without his consent, the court found that the evidence so showed, and said:

> "It is certainly against public policy for one to procure a policy of insurance on the life of another without such one's knowledge or consent. The wife has an insurable interest in the life of the husband; yet she could not obtain insurance upon his life without his knowledge and consent. Neither should the husband be allowed to procure a policy of insurance on the life of the wife without her knowledge and consent. If such practice was indulged, it might be a fruitful source of crime."

The judgment of the trial court for the plaintiff was reversed.

In addition we cite:

Acme Manuf. Co. v. *McCormick,* 175 N. C. 277, 95 S. E. 555, L. R. A. 1918 F. 572.

American Mutual Life Ins. Co. v. *Bertram,* 163 Ind. 51, 70 N. E. 258, 260.

37 C. J. (Life Insurance), page 381, § 45.

Couch's Cyc. of Insurance Law, Vol. 1, page 779, § 296.

As held by the Court of Appeals, the findings of the trial court that Frank Obartuch never knew that he signed applications for insurance, never wanted insurance, never knew he was insured, and that the policies were obtained by a conspiracy against the company by Frank's relatives, and that such conspiracy was contrary to public policy, are clearly sustained by the evidence, without the support of Dr. Rubens' testimony.

In *Railway Company* v. *Rock*, 279 U. S. 410, 73 L. Ed. 766, the plaintiff, whose true name was Joe Rock, obtained employment with the defendant railway company, by using the name John Rock, and having a man named Lenhart take the physical examination which was required by the railway company, because Rock knew that he could not pass the examination and had been previously rejected on a similar examination. He sued under the Federal Employers' Liability Act, recovered judgment in the Circuit Court for $15,000, which judgment was affirmed in the Appellate Court (247 Ill. App. 600), and certiorari was denied by the Supreme Court of Illinois. This Court granted certiorari and reversed without remanding the case, saying (73 L. E. 770):

> "Respondent's position as employee is essential to his right to recover under the act. He in fact performed the work of a switchman for petitioner, but he was not of right its employee, within the meaning of the act. He obtained and held his place through fraudulent means. While his physical condition was not a cause of his injuries, it did have direct relation to the propriety of admitting him to such employment. It was at all times his duty to disclose his identity and physical condition to petitioner. His failure so to do **was a continuing wrong in the nature of a cheat.** The misrepresentation and injury may not be regarded as unrelated contemporary facts. As a result of his concealment **his status was at all times wrongful,** a fraud upon the petitioner, and a peril to its patrons and its other employees. **Right to recover may not justly or reasonably be rested on a foundation so**

abhorrent to public policy, *N. Y. C. R. R. Co.* v. *Lockwood, supra; Great Northern R. Co.* v. *Wiles,* 240 U. S. 444, 448, 60 L. ed. 732, 734, 36 Sup. Ct. Rep. 406; *Stafford* v. *Baltimore & O. R. Co.* (D. C.) 262 Fed. 807."

The Illinois Criminal Code, Chap. 38, § 293, makes it a criminal act "to cause any person to be insured under an assumed name." There are other applicable provisions, such as the statutes against the "confidence game" and obtaining money under false pretenses.

It is uniformly held that a contract which is obtained by criminal means is contrary to public policy and therefore void, at least as to the parties to the conspiracy and to the criminal act. 17 C. J. Secundum, § 272, p. 656.

D. The case being tried without a jury, the findings of the trial court should be taken as true.

Applicable statutes, the rules of this court so provide, and the decisions of this court are all to this effect.

In fact, there is no assignment of error made here against the findings of the trial court.

Yet we find a one-sided statement of the evidence in the petition for certiorari, pages 5-10, and in the argument there is a studied attempt to lead this court to believe that there was only "an alleged substitution" and that the evidence was insufficient to show a criminal conspiracy on the part of plaintiff and her family.

We think we are entitled to start out with the premise contained in the findings of fact entered by the trial court, without discussing in detail the evidence.

These findings of fact were that Frank Obartuch was not the person examined, that if he signed the application and other papers, he did so without knowing the contents thereof, and without the intention of obtaining insurance; that he did not desire to take out insurance; that the poli-

cies of insurance were obtained by the sons of Frank Obartuch and the plaintiff, without the knowledge or consent of Frank Obartuch, who died without knowledge that said insurance policies purporting to insure his life had been issued (R. 711-12).

Further, that the defendant company intended to insure and did insure the life of the person who was examined by its doctor, and did not intend to insure, nor did it insure the life of Frank Obartuch; that the plaintiff, her sons and daughter, knew that the man examined was not Frank Obartuch; that Dr. Rubens, the medical examiner of the defendant, did not know that the person examined by him was not in fact Frank Obartuch nor did the defendant company at the time it issued the policies in suit know that the person examined by its medical examiner was not in fact Frank Obartuch; that the plaintiff, her sons and daughter, obtained the policies in suit by the substitution of a person other than Frank Obartuch, which person submitted to the medical examination of the defendant's doctor without the knowledge or consent of Frank Obartuch (R. 712).

Assuming these to be the facts that this court will consider, we will not discuss the evidence which supports the findings.

The Court of Appeals in its original opinion, said that there was sufficient evidence to support the findings, disregarding Dr. Rubens' testimony (R. 745):

> "The findings and conclusions complained of, however, find ample support in the testimony other than that given by the medical examiner."

After re-argument of the case upon petition for rehearing, the opinion of the Circuit Court of Appeals again calls attention to additional evidence than that of Dr. Rubens, to which no objection was made by plaintiff which

sustained the court's findings (R. 813-16). The court's opinion concluded:

> "A re-study of the record confirms our conclusion that the evidence supports the findings as made by the District Court, and that the findings support the judgment." (R. 817.)

II.

There Was No Error in Admitting Dr. Rubens' Testimony That the Application Was Not Signed in His Presence.

The certificate of Dr. Rubens was double in effect, (1) that he saw the applicant attach his signature, and (2) that he reviewed the answers with the applicant.

Dr. Rubens testified without objection and without contradiction of the document that the answers shown in parts 2 and 3 (R. 116-118), were answers made by the man examined; and further, without objection, that the photograph shown him of the real Frank Obartuch (R. 165) did not depict the man whom he had examined, who was represented to be Frank Obartuch (R. 112-113).

The Court of Appeals points out that neither side inquired of Dr. Rubens why the application was left with the person examined, or by whom it was presented to the doctor on the following day (R. 813-814).

At the trial when Dr. Rubens was being examined, defendant's attorney pointed out that he might be cross-examined as to how he happened to sign (R. 122) as follows:

> "Mr. Bourland: And they might cross-examine him about whether the statement is correct or how he happened to sign it, but he certainly is entitled to testify to the fact as to whether or not the man represented to be Frank Obartuch signed these documents."

For the defendant to ask its witness why he left the document with the supposed Frank Obartuch, would appear to

be cross-examination of its own witness. Apparently the reason why plaintiff did not cross-examine upon this subject is because Dr. Rubens was examined before trial by the plaintiff (R. 124). Apparently, plaintiff did not thereafter desire to again bring out the doctor's reasons for leaving the documents.

The fact that the doctor attested the signature which he did not actually see signed, is not to be commended, but it is a matter of common knowledge that this is frequently done by laymen and we might even say by lawyers,—that signatures are witnessed without sufficient assurance that they have been signed by the persons purporting to sign.

A. The opinions of the Court of Appeals (R. 744-816) show some of the authorities recognizing the well established exception to the Parol Evidence Rule where it is sought to impeach a written contract for fraud.

The statement as to the exception to the Parol Evidence Rule, quoted in the opinion, from 56 A. L. R. 86, has been cited with approval in more than one hundred cases. (See A. L. R. Blue Book of supplemental decisions, 1939 revision.)

This is not new law,—it was announced emphatically as early as 1872, in *Union Mutual Life Insurance Co.* v. *Wilkinson,* 80 U. S. 222 (13 Wall.), 20 L. E. 617-622.

See also Greenleaf on Evidence, 14th Edition, 1883, Sec. 284, p. 360.

B. Dr. Rubens' signature was attached merely as a testimonial; an attesting witness may always impeach his attestation.

Wigmore on Evidence, 1904 Edition, § 528, p. 658, states this further exception to the Parol Evidence Rule which has not been referred to by the Court of Appeals. It is important because it will be noted that Dr. Rubens signed merely in a testimonial capacity:

"§ 528: *Same: Attesting Witness contradicting his*

Attestation. The general notion that a person cannot be heard to repudiate his own formal assertion made on a former occasion was responsible for the attempt, often made during the 1600s and 1700s, to *forbid* an attesting witness to *repudiate* his attestation by swearing that, though he did attest the execution, yet in fact he attested falsely. But this doctrine, though repeatedly urged by counsel and though apparently in harmony with popular notions of the time, *was as constantly repudiated by the judges.* That the propounder of the will may, in spite of the attesting witnesses' denials, prove otherwise the genuineness of execution, involves a different principle, elsewhere considered (*post*, § 1302)."

In Sec. 530 he says (p. 663):

"*Same. Contradicting one's Own Official Certificate.* A notion almost identical with that underlying the rule of *Walton* v. *Shelly* has led to the argument that an official who has certified to a specific fact as known to him to have occurred will not be allowed to testify, in contradiction to the certificate, that the facts were otherwise than as certified: * * * (After quoting from *Briggs* v. *Stafford*, 14 La. o. s. 381.)

"*The notion has no better grounds for support here than elsewhere.* If the certificate is not absolutely conclusive (*post*, §§ 1345-1352) and may be otherwise shown to be incorrect, then the official *should be equally competent.* The official doubtless should be punished, but *not* the party needing his testimony. The official is clearly capable of falsification, but the *value* of his testimony should be left to the jury:"

Mr. Wigmore's 2d edition published in 1922 contains the same statement (§§ 528-530) with the citation of some additional cases, including two from Illinois, where it was held that the notary may impeach his certificate of acknowledgment:

Parlin & Orendorff Co. v. *Hutson*, 198 Ill. 389.
Union Colliery Co. v. *Fishback*, 299 Ill. 165.

See also:

22 Corpus Juris, p. 1215 *et seq.*, and sec. 1630, p. 1222, sec. 1645, p. 1233, sec. 1679, p. 1259.

Miller v. *Troy Laundry Machinery Co.*, (Okla.) 62 Pac. 2d 975-977.

American Bankers Ins. Co. v. *Hopkins*, (Okla.) 169 Pac. 489, 491-2.

III.

Dr. Rubens' Testimony Did Not Impeach Documents Introduced by Defendant-Respondent.

The facts are contrary to petitioner's argument on this subject.

Plaintiff introduced as her Exhibits 1 and 2 the two original insurance policies. To each of these policies was attached photostatic copies of parts 1 and 2, part 1 being the application (R. 79), and part 2 being entitled "Questions of Medical Examiner and Answers Thereto" (R. 78). For convenience the photostatic copy of part 2 is not shown at R. 78, but is referred to as being "the same as Defendant's Exhibit 5" (R. 118). Plaintiff offered in evidence parts 1 and 2 when she offered her Exhibits 1 and 2 (R. 68), and same were received without objection (R. 71).

The original document entitled "Part 3, Medical Examiner's Report" (R. 116), marked Defendant's Exhibit 4, was the reverse side of part 2, marked for identification as "Defendant's Exhibit 5" (R. 118). Part 3 was not attached to the policy nor was any copy of it attached. When part 3 was offered in evidence as Defendant's Exhibit 4, plaintiff objected to its introduction upon the ground that it was not a part of the policy (R. 109).

As it was not a part of the contract, there seems to be no good reason to claim that it comes within the Parol Evidence Rule.

In any event there was no attempt to contradict or impeach any part of Defendant's Exhibit 4 (part 3); on the other hand Dr. Rubens testified without objection by plain-

tiff, that the man he examined corresponded in every respect with every statement made in part 3. The evidence of all the other witnesses shows that Frank Obartuch did *not* correspond to the description given in the medical examiner's report, part 3; in other words, instead of our impeaching part 3 in any way, we relied upon the description in part 3 as being the description of the man examined, which definitely showed the substitution.

One of the strong points of our proof was that there was no conceivable reason for Dr. Rubens to describe, otherwise than correctly, the man he examined. The description and dimensions which he entered upon part 3 at the time of the examination, did not correspond to the description and dimensions of the real Frank Obartuch, as given by defendant's witnesses, nor to the description and dimensions of Frank Obartuch as given by plaintiff's own witnesses (largely members of his family) in their depositions before trial and in their testimony at the trial.

The reason why plaintiff's testimony as to the description and dimensions of Frank Obartuch did not correspond with part 3, is that part 3 was not attached to the policy. For, if plaintiff's witnesses had been able to refresh themselves by part 3, their willingness and aptitude for perjury would have made a conflict of testimony. But plaintiff was caught unaware of what Dr. Rubens reduced to writing at the time of the examination.

If Dr. Rubens had been a party to the conspiracy, he would have made the description of the man examined correspond with the real Frank Obartuch. This makes it self-evident that he was innocent, that his signature to part 2, attesting Frank Obartuch's signature, was obtained by fraud, as the Circuit Court of Appeals held (R. 814).

Bearing in mind that part 2 was introduced by plaintiff as a part of Plaintiff's Exhibits 1 and 2, let us see how it came to be marked as Defendant's Exhibit 5.

Dr. Rubens was shown the original document which was mainly in his handwriting. Part 3 was not signed by anybody except Dr. Rubens, whereas part 2 contains the signature "Frank Obartuch." For reference and identification the original document, part 3, was marked Defendant's Exhibit 4 and the reverse side, part 2 was marked Defendant's Exhibit 5 (R. 106-118).

In the first instance the insurance company's attorney offered the entire document saying (R. 108):

> "Mr. Bourland: I offer in evidence at this time, if your Honor please, Defendant's Exhibits 4 and 5, and will ask leave to substitute photostatic copies. There has already been introduced, your Honor, as parts of the insurance policies what are called parts 1 and 2. That is the photostat that is in the two insurance policies. Now on the reverse side of part 2 is part 3, which has not been introduced and is not attached to the insurance policy. This is what has been identified as the original documents."

Mr. Pearson, as attorney for the appellant, then objected to the introduction of part 3 upon the ground that it was not admissible, because it was not appended to the original policy.

At R. 110, Mr. Bourland stated:

> "Well, parts 1 and 2 are already in evidence. I *will withdraw* the originals of Defendant's Exhibits 4 and 5 and ask that the photostat of part 3 be identified as Defendant's Exhibit 4 and that the original part 3 be identified by the reporter as Defendant's Exhibit 4, both of them marked 4. But I will later ask leave to substitute the photostat instead of the original."

When Mr. Bourland renewed the offer of the exhibit, he offered *only* Defendant's Exhibit 4, which was part 3 (Tr. 114), and at Tr. 115 Mr. Bourland said:

> "I would like to substitute just the one page, a photostatic copy of it, Defendant's Exhibit 4. There has already been introduced part 2, a photostat, and which is part of the insurance policy."

The stenographer or person preparing the record, then indicated by his notation, that Defendant's Exhibits 4 and 5 were *both* received in evidence, and made the notation (or plaintiff's counsel did), as follows:

> "Defendant's Exhibits 4 and 5 are respectively part 3 and part 2 of the application of Frank Obartuch, the originals of which are on opposite sides of the same paper. The following are photostatic copies of said Exhibits 4 and 5."

It thus appears from this record that what was offered by Mr. Bourland was only part 3, Defendant's Exhibit 4.

Parts 1 and 2 were already in evidence as pleaded in the complaint, admitted in the answer, and expressly offered in evidence by plaintiff (Tr. 71-86), so that it is not now fair to say, any more than it has ever been fair to say, that the defendant offered or vouched for part 2, or contradicted its own exhibit in any respect, because part 2 was always a part of the original policy which was offered in evidence by the plaintiff.

The Court of Appeals said (R. 743) in its first opinion:

> "For some reason not entirely apparent, part 2 was also offered by the defendant and received in evidence as its Exhibit 5."

The complete and apparently satisfactory explanation was made in our reply to the petition for rehearing (R. 798, 799), substantially as now made, because the second opinion did not refer to the point.

We need not refer to the authorities cited by petitioner as to the right of a party to impeach his own exhibit, because it is clear that the exhibit which Dr. Rubens contradicted was part 2, which was incorporated in the policy pleaded *in haec verba* in plaintiff's complaint, and which was introduced as plaintiff's exhibit as part of Plaintiff's Exhibits 1 and 2.

The only way Dr. Rubens contradicted this part 2 (part of Pltfs. Exs. 1 and 2) was by saying that Frank Obartuch

did not sign in his presence. Dr. Rubens' signature was merely a testimonial, as a witness to the signature, and under the authorities heretofore cited, the testimony did not violate the Parol Evidence Rule.

Much is said by petitioner in her argument on the facts (which have been decided against her by both lower courts) as to the date of the examination, June 11, 1931, in connection with the date of Rubens' testimonial certificate as to the signature of Frank Obartuch. Both parts 2 and 3 are dated June 11, 1931. Part 3 contains the Doctor's report on the examination of the subject's urine. It is not denied that this examination was made on the following day which would be June 12, 1931 (R. 124). It thus becomes rather obvious that the Doctor had the habit of dating all the papers as of the date of the examination. But plaintiff did not see fit to cross-examine on this subject; after having taken his deposition in advance of trial (R. 132), plaintiff seems to have been strangely uninterested in "why" Dr. Rubens signed or used the date of June 11, 1931. This would have been proper cross-examination for plaintiff but improper direct examination by defendant of its own witness.

Petitioner Is Also Wrong as to the Law.

Petitioner is quite apologetic about the Illinois cases cited (Brief, p. 11) to the effect that one may not contradict a document introduced. None of the cases cited by petitioner is a well considered opinion and as petitioner acknowledges, there is a conflict of authority—it may safely be said that the weight of authority is against the uncited and undiscussed language of the cases relied upon. Illinois has always held that a party or other witness might be contradicted, although not impeached (*Chance* v. *Kinsella*, 310 Ill. 515, 523) and there seems to be no good reason why a different rule should be applied to documentary evidence.

If it can be said at all, that respondent re-introduced part 2, in view of the record above set forth, it was merely because it was the reverse side of part 3. The rule is uniformly stated that when a document is introduced for a specific purpose, such as to impeach for fraud, the party introducing may contradict.

20 Am. Jur. (Evidence), Sec. 915, p. 771-2.

Snell Isle v. *Com'r. Int. Rev.* (C. C. A. 5th), 90 F. 2d 481, cert. denied, 302 U. S. 734.

There is an additional reason why petitioner's point is not well taken, and that is because there is no place in the record in the trial court where there was any objection made upon the ground that the defendant was impeaching a document which the defendant had introduced. Trial counsel for the plaintiff in the District Court well knew that he had introduced part 2 as a part of the insurance policies in suit, and that the defendant had not introduced part 2, because there was no necessary reason for introducing it when it was already in evidence. Therefore, trial counsel made no objection upon this ground, and it was too late for the plaintiff's present counsel to first raise the question in the Court of Appeals.

IV.

The Defense of Substitution of a Person Other Than the Named Insured at the Medical Examination, Is Not Precluded by the Incontestable Clause, Under the Law of Illinois or Elsewhere.

The Illinois cases cited at page 15 of petitioner's brief, as well as the decisions of the Seventh Circuit Court of Appeals there cited, apply to the ordinary cases of fraud arising under the incontestable clause.

There is not a case in Illinois nor anywhere else that we have been able to find, and certainly none has been

cited by petitioner, which holds that the incontestable clause does apply where there has been a fraudulent substitution or impersonation at the medical examination.

All of the cases in this country which have passed upon the question of substitution, have held that where there was an impersonation at the medical examination, there was no contract, and therefore, no incontestable clause to apply.

All the text writers and annotators have taken the same view,—that this defense may be presented notwithstanding the incontestable clause.

There is no decided case which makes the distinction counsel attempts, that the signature upon the application, makes the slightest difference upon the question of law presented as to the substitution or impersonation at the medical examination.

The decided cases upon substitution are throughly discussed in the first opinion of the Court of Appeals (R. 740-742).

The only substitution case in Illinois holds that the incontestable clause does not apply,—*Valant* v. *Metropolitan Life Ins. Co.*, 302 Ill. App. 196, 23 N. E. 2d 922.

The record will be searched in vain for any statement by respondent's attorney that it waived any defense. As we have shown, under Point I there was no limitation of the issues or waiver of any defense by respondent.

The first opinion of the Circuit Court of Appeals (R. 739, 740) shows that the reason of petitioner for grasping at the reed of waiver is to escape the *rationale* of the substitution cases, for certainly petitioner has never contended and could never contend that the substitution cases can be distinguished otherwise. But the record fails to support her contention that there was either a limitation or waiver.

There is an important reason why the fraudulent act

of substitution at the medical examination is more important than fraudulent representations or fraudulent intent to commit suicide, such as was involved in the incontestable clause cases cited by petitioner (Brief, pp. 15-16). The rule is well stated in the *Maslin* case, 3 Fed. Supp. 368, at p. 370:

> "It is a rule applicable to contracts generally that where a man, pretending to be someone else, goes in person to another and induces him to make a contract, the resulting contract is with the person actually seen and dealt with and not with the person whose name was used. *Phelps* v. *McQuade*, 220 N. Y. 232, 115 N. E. 441, L. R. A. 1918B, 973; *Eastern Exchange Bank* v. *Fidelity & Deposit Co.*, 245 N. Y. 340, 157 N. E. 260, 52 A. L. R. 1373; *Gotthelf* v. *Shapiro*, 136 App. Div. 1, 120 N. Y. S. 210, *Robertson* v. *Coleman*, 141 Mass. 231, 4 N. E. 619, 55 Am. Rep. 471; *United States* v. *National Exchange Bank* (C. C.), 45 F. 163; Williston on Contracts, § 1517; Ashley, Mutual Assent in Contracts, 3 Columbia Law Review, pages 71, 73, 74."

This general rule of law is also announced in 23 R. C. L., Sect. 113, p. 1298.

See also annotation 98 A. L. R., page 710.

There is an additional rule of law which is not referred to by the Court of Appeals, which renders invalid a contract where there is a fraudulent substitution, which is well stated in 17 C. J. S. sec. 144(d), p. 499, as follows:

> "d. Identity of Parties.
>
> "Mistake respecting the identity of parties to the contract will invalidate it, although the doctrine is inapplicable where the mistake relates to the property rather than to the identity of the person contracted with.
>
> "There is no agreement where one party enters into the contract under a mistake **as to the identity of the other party**, as where the party contracted with has falsely represented himself to be another, or has accepted an offer meant for another."

Among the numerous cases cited in support of this rule are:

Arkansas Smelting Co. v. *Belden Co.*, 127 U. S. 379, 387, 388.

McClanahan v. *State Automobile Mutual Insurance Co.* (Tenn.), 108 S. W. 2d, 1102.

Gallopin v. *Continental Cas. Co.*, 290 Ill. App. 8, 7 N. E. 2d, 771, 773.

Colt Co. v. *Grubbs* (Ky.), 263 S. W. 749, 751.

The facts stated by petitioner (Brief, p. 16), in connection with the citation of the case of *Guardian Mutual Life Ins. Co.* v. *Hogan*, 80 Ill. 35, like many other facts stated in the petition and brief, are not entirely accurate, but we have not attempted to correct all of the misstatements, as it would unduly prolong this brief. As to the statement that Dr. Rubens testified that Friedman introduced him to the person represented to be Frank Obartuch, the record shows that Dr. Rubens so testified in his deposition in advance of trial, but in his testimony at the trial said that (R. 132):

> "I know that during the deposition that I testified that Mr. Friedman was there, but since then I have thought the thing over and I am not so sure whether he was or not."

Likewise the quotation from the cited case, *Guardian Mutual Life Ins. Co.* v. *Hogan*, 80 Ill. 35, is not entirely fair. It is taken out of the context and the facts were not the same in any respect. The insured, Hogan, does not seem to have either been examined or to have signed any application for the policy. The question was treated as a matter arising upon the pleadings as the court said (pp. 39-40):

> "Although it may be otherwise upon the proof upon any question as to the validity of the policy, as respects the form of the declaration, we regard the company as concluded from making any such objection. With knowledge of the facts, the agents of the com-

> pany allowed, and were instrumental in causing, the transaction of the insurance to assume the form which it did, and in framing the declaration upon the policy, the plaintiff was justified in treating it according to its purport, and **upon a mere question of pleading,** the company should not be heard to make the objection, that the transaction was different, in fact, from what it purported to be by the policy."

It is important to remember that the trial court specially found that Dr. Rubens "did not know that the person examined by him who gave the name of Frank Obartuch, was not in fact the real Frank Obartuch, nor did defendant company, at the time it issued the policies in suit, know that the person examined by its medical examiner was not in fact Frank Obartuch, deceased" (R. 712).

This is a sufficient answer to the insinuations that Rubens or Friedman or someone else on the part of the company, was a party to the fraud.

V.

Petitioner Has Not Shown Grounds for the Issuance of a Writ of Certiorari.

The opinion of the Court of Appeals upon rehearing (R. 814-16) sufficiently distinguishes the decision in *New York Life Ins. Co.* v. *Stewart,* 69 F. 2d, 957, so as to demonstrate that there is no occasion for taking jurisdiction because of a supposed conflict of Federal decisions.

The cases cited by petitioner (*R. R. Co.* v. *R. R. Co.,* 199 U. S. 160, 166, and *R. R. Co.* v. *Schuette,* 103 U. S. 118, 143) holding that where a case is decided upon two grounds, as for instance in the 199 U. S. case, (1) the terms of a contract, and (2) the statute, are in nowise applicable. In the Stewart case, but one ground for decision was announced, that plaintiff's insured could not hold the policy, with the false answers in the application as a part thereof, and then

the beneficiary sue upon the policy and have the medical examiner testify that he had transcribed the answers untruthfully.

No case has been cited by petitioner, that the insurance company may not impeach the signature of its medical examiner for fraud of the person examined or for fraud of the medical examiner, because its medical examiner is not acting as its agent when defrauding the insurance company (*Mutual Life Ins. Co.* v. *Hilton-Green*, 241 U. S. 613, 622).

We have previously shown that there is no conflict with Illinois decisions which hold that a party may not dispute or contradict its own exhibits, because the facts indisputably show that defendant-respondent did not contradict, dispute or impeach exhibits introduced by it.

The decision in the Circuit Court of Appeals is not in conflict with the Illinois decisions as to the incontestable clause, because none of the cited decisions was a fraudulent substitution case and the only Illinois case passing upon the question of a fraudulent substitution at the medical examination, holds that the incontestable clause does not apply. (*Valant* v. *Metropolitan Life Ins. Co.*, 302 Ill. App. 196, 23 N. E. 2d 922.)

The cases cited to the effect that the insurer may not dispute a recital in an issued policy acknowledging receipt of payment of premium, are likewise sufficiently distinguished by the opinion of the Court of Appeals (R. 743).

Conclusion.

In the "conclusion" of petitioner it is suggested that there is a question of policy involved, among other things, because the signature of the named insured was "certified to by the insured's agent." In this connection we call attention to the fact that while objection was made to Dr. Rubens' testimony upon the ground that it violated the Parol Evidence Rule, she did not object when the agent

Friedman testified that he signed in the absence of Frank Obartuch, and that he did not see the signature "Frank Obartuch" attached to the various documents which he witnessed (R. 315).

We suggest that there is no danger in the honest case of the medical examiner denying that the person examined was the person named; that in the honest case there would be no difficulty in the named insured's beneficiary proving that the named insured was the one who was examined; for instance, in the honest case, the dimensions of the man examined would coincide with those of the man named in the policy, whereas in this dishonest case, the dimensions and other descriptions of the man examined did not coincide or compare with those of the real Frank Obartuch (R. 116, Wiczas 167, Ruttenberg 238-9, Friedman 330, Dobija 286, Sepancki 181, Dankowski 219, Lewakowski 291); in the honest case, the named insured would have received the premium notices and paid the premiums. In this case Frank Obartuch's sons took positive steps to cause the premium notices to be sent to Michael's office so that Frank would not get them (R. 646-47); the premiums were paid by the sons and Frank was destitute (R. 171, 174, 185, 186, 276).

In the honest case, the person examined would have told his correct age to the doctor examining him and the beneficiary would have no difficulty showing this was the true age; in this case, the man examined stated to the doctor (R. 79-110), that he was 50 years of age, born October 4, 1881. In his Pauper's affidavit Frank Obartuch said he was 64 in 1934 (R. 143), as he did in his complaint filed against his family to recover his real estate (R. 234). Plaintiff stated under oath in this real estate suit that her husband was 64 years of age in 1934 (making Frank 61 at the examination date in 1931), and her affidavit was notarized by her attorney-son Michael (R. 150-152).

There are many other reasons which might be suggested why the honest case will take care of itself.

On the other hand, life insurance companies would be helpless if some one could be substituted for the medical examination and they could be required to contract with persons other than those they intended to insure. As has been aptly said in all the decided cases, life insurance companies insure lives and not names.

The Parol Evidence Rule was never intended to protect and shield fraud, nor has it ever been successfully invoked to make a contract, where a contract would not exist unless the Parol Evidence Rule was used.

We submit it would be an outrage upon justice to hold that there was a valid policy, when Frank Obartuch never knew that he had applied for insurance, never wanted insurance, attempted to change the beneficiaries in all the policies about which he knew, and certainly never desired to have $20,000 of insurance payable to his widow from whom he was estranged, when he never paid a nickel on the premiums and there is not a syllable of truthful testimony in the record that he ever participated in any way in either getting or perpetuating the policies.

We respectfully submit that the petition for writ of certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

No. 663

JULIA OBARTUCH,

Petitioner,

vs.

SECURITY MUTUAL LIFE INSURANCE COMPANY,
A CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY TO PETITION FOR REHEARING.

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REPLY TO PETITION FOR REHEARING.

We have hesitated to file this answer but inquiry discloses that there is no rule against answer and that answers are appropriately filed.

The Petition for Rehearing is directly misleading because it represents that the petitioner has not heretofore presented the alleged conflict with Illinois authorities. The fact is that the cases now cited in the Petition for Rehearing as to the alleged conflict were cited in petitioner's petition for writ of certiorari at pages 16 and 18, and also cited in the brief in support of the petition for writ of certiorari at page 15. The point was answered in our brief

in opposition to the petition for writ of certiorari at page 26. What petitioner now says as to the alleged "public importance" of granting certiorari is also stated in slightly different words in the petition and brief in support thereof.

We did not fear that this court would fail to discover this lack of novelty in the Petition for Rehearing but thought that it might be helpful to suggest the particular pages where the same cases were cited and that the same argument was made heretofore.

Respectfully submitted,

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